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Supreme Court of the United States.

October Term, 1899.

Filed April 9, 1900.

No. 1, Original.

The State of Missouri,

Complainant,

vs.

The State of Illinois and the Sanitary District of Chicago,

Defendants.

Brief and Argument of Complainant in Support of the Demurrer to the Bill of Complaint.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

NUMBER 7, ORIGINAL.

THE STATE OF MISSOURI, COMPLAINANT,

v.

THE STATE OF ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO, DEFENDANTS.

Brief and Argument in Support of the Demurrer to the Bill of Complaint.

ORIGINAL JURISDICTION.

The Complainant in this action invokes the original jurisdiction of this Court. The records of this Court contain but few cases of this kind. It is conceded that the judicial power of the United States under the Constitution extends to controversies between two or more States, and between a State and citizens of another State; and that in all cases, justiciable in this Court, in which a State shall be a party, this Court shall have original jurisdiction. (Constitution of the United States, Sec. 2, Art. III.) Yet,

notwithstanding the comprehensive words of the Constitution, the mere fact that a State is a plaintiff, is not a conclusive test that the controversy is one in which this Court is authorized to grant relief against another State or her citizens. A consideration of the cases in which this Court has heretofore had occasion to pass upon the construction and effect of these provisions of the Constitution, may throw light on the determination of the question before us. (See opinion of the Supreme Court by Mr. Justice Gray, in the case of Wisconsin *v.* Pelican Ins. Co., 127 U. S. 287.)

The most numerous class of cases of this kind is that of controversies between two States as to the boundaries of their territory. All such cases are cited in the opinion of this Court in the Wisconsin case *supra*. This Court also in that case pointed out the adjudicated cases in which this Court had taken original jurisdiction. By the Judiciary Act of 1789, it was enacted that, "The Supreme Court shall have exclusive jurisdiction of controversies of a civil nature, where the State is a party, except between a State and its citizens; and except also between a State and a citizen of another State or aliens, in which latter case, it shall have original but not exclusive jurisdiction." (Sec. 687 Revised Statutes of the United States.)

In Cohens *v.* Virginia, 6 Wheaton, 264, decided at the October term, 1821, Chief Justice Marshall, after showing that the Constitution had given jurisdiction to the courts of the Union in two classes of cases, in one of which, comprehending cases arising under the Constitution, laws and treaties of the United States, the jurisdiction depended on the character of the cause, and in the other, comprehending controversies between two or more States, between a State and citizens of another State, the jurisdiction depended entirely on the character of the parties,

said: "The original jurisdiction of the Supreme Court, in cases where a State is a party, refers to those cases in which, according to the grant of power made in the preceding clause, jurisdiction might be exercised in consequence of the character of the party, and an original suit might be instituted in any of the federal courts; not of those cases in which an original suit might not be instituted in a federal court. Of the last description, is every case between a State and its citizens and perhaps every case in which a State is enforcing its penal laws. In which cases, therefore, the Supreme Court cannot take original jurisdiction." 6 Wheaton 398, 399; Wisconsin *v.* Pelican Ins. Co. *supra*, 127 U. S. 299.

In the Pelican Insurance Company's case, this Court held that it did not have original jurisdiction, and entered judgment for defendants on the demurrer, upon the ground that this Court has not original jurisdiction of an action by a State, upon a judgment recovered by it in one of its own courts, against a citizen or corporation of another State for a pecuniary penalty for the violation of its municipal laws.

The subject-matter of the case at bar is not such that it arises under the Constitution, laws and treaties of the United States. Hence, the jurisdiction of this Court depends in this case, not on the character of the case, but if it can be maintained at all, it must be on account of the parties thereto.

Does the Bill of Complaint in this case contain such allegations as show that the State of Missouri as such, has a civil controversy against the State of Illinois and a corporation created by the State, which is a citizen of the State, justiciable in this Court, within the meaning of the Constitution and Statutes of the United States, which define the jurisdiction of the federal courts? This is the question raised by the demurrer in this case.

ADMISSIONS.

The Defendants, by filing a demurrer to the complaint in this case, are held to admit the truth of the facts alleged in the complaint only so far as they are material, relevant, and well pleaded. The allegation in the complaint that the State of Missouri, unless Defendants are restrained from committing the acts complained of, will be deprived of the use of the waters of the Mississippi River, for drinking and for domestic, manufacturing and agricultural purposes, is not sufficient to show wherein and to what extent the State of Missouri would be injured. The gist of this action is a threatened injury to Complainant. The damage which Complainant may sustain must be shown and it must be stated with convenient particularity. The allegation in the complaint is too vague, uncertain, and indefinite to put Defendants on notice as to the nature of the case to be proved. The fact as to damage not having been well pleaded by Complainant, Demurrants cannot be held to have admitted the truth of said allegation.

In the case of Spooner *v.* McConnell *et al.*, 1 McLean (U. S.), 337, McLean, Circuit Judge, held: "The Complainant alleges generally, that he will be injured in his property by the construction of the dam, and on these grounds prays an injunction; but he does not show how he will be injured. This is necessary, that the Court may judge whether the wrong complained of entitles him to an injunction. Every wrong done in this way, on which an action may be sustained, will not entitle the party to an injunction. The facts must present a case which can not be adequately redressed in any other form."

In the case of Bowen *v.* Mauzy, 117 Ind. 258, it appeared that the complaint for an injunction to restrain the erection of a blacksmith shop, stated: "The erection

and maintaining of a blacksmith shop at such place will destroy the free use of complainant's property." But the complaint did not allege that such business could not be conducted so as not to injure the complainant, nor that the defendants were intending to conduct it improperly, nor that they could not and would not conduct it so as to prevent all injury. In that case the Supreme Court of Indiana held, that the truth of these allegations of injury were not admitted by demurrer, they being mere conclusions. 12 Encyc. of P. & P., p. 1026.

Causes of Demurrer.

The Defendants in this case demur to the Bill of Complaint, filed herein, for the reason that the matters therein contained are not sufficient in law for the Complainant to maintain its action against the State of Illinois and the Sanitary District of Chicago, and they submit to the Court the following causes of demurrer:

First: That this Court has no jurisdiction of either the parties to, or of the subject-matter of this suit, because it appears upon the face of said Bill of Complaint, that the matters complained of, as set forth therein, do not constitute within the meaning of the Constitution of the United States, any controversy between the State of Missouri and the State of Illinois, or any of its citizens.

Second: That the matters alleged and set forth in said Bill of Complaint show that the only issues presented therein arise, if at all, between the State of Illinois and a public corporation created under the laws of said State, and certain cities and towns, in their corporate capacity as such, in the State of Missouri, and certain persons in said State of Missouri, residing on or near the banks of the Mississippi River, and which matters so stated in said

Bill of Complaint, if true, do not concern the State of Missouri as a corporate body or State.

Third: That said Bill of Complaint shows upon its face that this suit is in fact for and on behalf of certain cities and towns in said State of Missouri, situate on the banks of the Mississippi River, and certain persons who reside in said State on or near the banks of said river; and that, although the said suit is attempted to be prosecuted for and in the name of the State of Missouri, said State is, in effect, loaning its name to said cities and towns and to said individuals, and is only a nominal party to said suit, and that the real parties in interest are the said cities and towns in their corporate capacity as such, and said private persons or citizens of said State.

Fourth: That it appears upon the face of said Bill of Complaint, that the said State of Missouri, in her right of sovereignty, is seeking to maintain this suit for the redress of the supposed wrongs of certain cities and towns in said State, in their corporate capacity as such, and of certain private citizens of said State, while under the Constitution of the United States and the laws enacted thereunder, the said State possesses no such sovereignty as empowers it to bring an original suit in this Court for such purpose.

Fifth: That it appears upon the face of said Bill of Complaint, that no property rights of the State of Missouri are in any manner affected by the matters alleged in said Bill of Complaint; nor is there any such property right involved in this suit as would give this Court original jurisdiction of this cause.

Sixth: That in order to authorize this Court to maintain original jurisdiction of this suit as against the State of Illinois, or against any citizens of said State, it must appear that the controversy set forth in the Bill of Com-

plaint and to be determined by this Court, is a controversy arising directly between the State of Missouri and the State of Illinois, or some of its citizens, and not a controversy in vindication of the alleged grievances of certain cities and towns in said State or of particular individuals residing therein.

Seventh: That said Bill of Complaint is in other respects uncertain, informal, and insufficient, and that it does not state facts sufficient to entitle the said State of Missouri to the equitable relief prayed for in said Bill of Complaint.

We will consider these causes of demurrer generally and without special reference to the order in which they are stated.

Controversies Between States.

As to controversies between States, in the articles of Confederation, adopted in 1778, Article IX, Par. 2, it was provided as follows: "The United States in Congress Assembled, should also be the last resort on appeals in all disputes and differences now subsisting or that may hereafter arise between two or more States concerning boundary jurisdiction or any other cause whatever, which authority shall always be exercised in the manner following."

Then follows a provision, showing in what manner any State having a controversy with another may have such controversy determined.

The third paragraph of said Articles points out the methods for settling "all controversies," concerning the private rights of soil claimed under grants of two or more States.

These provisions were deemed impracticable for settling controversies between States by the framers of the Federal Constitution.

In the opinion of this Court, by his honor, Mr. Chief Justice Fuller, in the case of the State of Louisiana against the State of Texas, handed down at this term of court, on the 15th day of January last, there is recited the various steps which were taken in the Constitutional Convention, which led up to the adoption of clauses 1 and 2 of the second section of Article III, of the Constitution of the United States. That part of the opinion is so applicable to the case at bar, that we beg pardon of the Court for inserting it at length in our brief; it is as follows:

"In the Constitutional Convention, the Committee of Detail, composed of Rutledge, Randolph, Gorham, Ellsworth and Wilson, to which the resolutions arrived at by the Convention and sundry propositions had been referred, reported on the sixth of August, A. D. 1787, a draft of a constitution, consisting of twenty-three articles.

"The second section of the ninth article provided that as to 'all disputes and controversies now subsisting, or that may hereafter subsist, between two or more States, respecting jurisdiction or territory,' the Senate should have power to designate a special tribunal to finally determine the same by its judgment; and by the third section, 'all controversies concerning lands claimed under different grants of two or more States' were to be similarly determined.

"The third section of the proposed eleventh article provided, among other things, that the jurisdiction of the Supreme Court should extend 'to controversies between two or more States, except such as shall regard territory or jurisdiction; between a State and citizens of another State; between citizens of different States; and between a State, or the citizens thereof, and foreign States, citizens or subjects.'

"On the twenty-fifth of August Mr. Rutledge said in

respect to sections two and three of article nine: 'This provision for deciding controversies between the States was necessary under the confederation, but will be rendered unnecessary by the national judiciary now to be established;' and on his motion the sections were stricken out.

"The words 'between citizens of the same State claiming lands under grants of different States' were subsequently inserted in the third section of the eleventh article, and the words 'except such as shall regard territory or jurisdiction' omitted. 1 Elliot, 223, 224, 261, 262, 267, 270; 5 Elliot, 471; Meigs on Growth of the Constitution, 244, 249.

"Clauses 1 and 2 of the second section of Article III of the Constitution as finally adopted read:

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

"The reference we have made to the derivation of the

words 'controversies between two or more States' manifestly indicates that the framers of the Constitution intended that they should include something more than controversies over 'territory or jurisdiction,' for in the original draft as reported the latter controversies were to be disposed of by the Senate, and controversies other than those by the judiciary, to which by amendment all were finally committed. But it is apparent that the jurisdiction is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute and the matter in itself properly justiciable.

"Undoubtedly, as remarked by Mr. Justice Bradley in Hans *v.* Louisiana, 134 U. S. 1, 15, the Constitution made some things 'justiciable which were not known as such at the common law; such, for example, as controversies between States as to boundary lines, and other questions admitting of judicial solution . . . The establishment of this new branch of jurisdiction seemed to be necessary from the extinguishment of diplomatic relations between the States. Of other controversies between a State and another State or its citizens, which, on the settled principles of public law are not subjects of judicial cognizance, this court has often declined to take jurisdiction. See Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 288, 289, and cases there cited.'

"By the judiciary act of 1789 the judicial system was organized and the powers of the different courts defined. Its thirteenth section, carried forward as section 687 of the Revised Statutes, provided 'that the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a State is a party, except between a State and its citizens; and except also between a State and citizens of other States, or aliens, in which latter case it shall have original but not exclusive jurisdiction.'

"The language of the second clause of the second section of Article III, 'in all cases in which a State shall be party,' means in all the *enumerated cases* in which a State shall be a party, and this is stated expressly when the clause speaks of the other cases where appellate jurisdiction is to be exercised. This second clause distributes the jurisdiction conferred in the previous one into original and appellate jurisdiction, but does not profess to confer any. The original jurisdiction depends solely on the character of the parties and is confined to the cases in which are those enumerated and those only. California *v.* Southern Pacific Railroad Company, 157 U. S. 229, 259; United States *v.* Texas, 143 U. S. 621. And by the Constitution and according to the statute, the original jurisdiction of this court is exclusive over suits between States, though not exclusive over those between a State and citizens of another State."

As stated by this Court in that case the language of the second clause of the second section of Article III, of the Constitution of the United States, in reference to cases in which a State shall be a party, refers to the "enumerated cases," in which a State shall be a party. This is evident from the subsequent sentence, which contains the phrase, "in all other cases before mentioned." The second clause merely distributes the jurisdiction conferred, into original and appellate, but does not confer any new jurisdiction.

The opinion of this Court in the Louisiana case *supra*, after referring to the XIth amendment to the Constitution and after quoting the language of Mr. Chief Justice Waite, in the cases of New Hampshire *v.* Louisiana, and New York *v.* Louisiana, 108 U. S. 76, contains the following paragraph:

"In order to maintain jurisdiction of this Bill of Com-

plaint as against the State of Texas, it must appear that the controversy to be determined is a controversy arising directly between the State of Louisiana and the State of Texas, and not a controversy in vindication of the grievances of particular individuals."

The bill of complaint in the Louisiana case, set forth, in substance, that the City of New Orleans was located in the State of Louisiana; that there were several lines of railroad running directly from that city into the State of Texas, and into the States and Territories beyond that State, and that the inhabitants of those States and Territories and the citizens of New Orleans were engaged in interstate commerce; that the State of Texas had by its legislature, granted to the Governor and her health officials extensive powers in reference to quarantine against infectious or contagious diseases; that on the first day of March, 1899, the Governor of the State of Texas, issued a proclamation, establishing a quarantine on the Gulf coast; that there was a case of yellow fever reported in New Orleans, and that this case was made a pretext for the officers of the State of Texas to place an embargo on all commerce between the City of New Orleans and the State of Texas, and prohibited all common carriers entering the State of Texas, and from bringing into said State any freight or passengers, or even the mails of the United States coming from the City of New Orleans, and to enforce these orders, armed guards, acting under the authority of the State of Texas, were placed on all lines of travel from the State of Louisiana, into the State of Texas, with instructions to enforce the embargo *vi et armis*, which instructions were being carried out to the letter; that the complainant, while recognizing the right of the officials of the State of Texas to take prudent and reasonable measures to protect the people of said State from

infection, denied the right of the State of Texas to prohibit or so burden interstate commerce as to make such commerce impossible. After reciting the history of other quarantine occasions, when quarantine regulations were enforced, the complainant alleged that the effect of the present embargo by the State of Texas, upon the commerce of the City of New Orleans, was to build up and benefit the commerce of Galveston and other cities in the State of Texas, which were commercial rivals of the City of New Orleans, for the large commerce of the State of Texas and adjoining States and Territories; that the unreasonable, harsh, and discriminating character of the pretended quarantine, is nothing less than a commercial war declared against the State of Louisiana and her ports, cities and citizens, not for the *bona fide* purpose of protecting the health of the State of Texas, but for the purpose of increasing the trade and commerce of the State of Texas and of her ports, cities and citizens, to the great damage and injury of the State of Louisiana, and her citizens; that such embargoes on interstate commerce injure and impoverish the citizens of Louisiana, reduce the value of her taxable property, diminish her revenues, retard immigration, reduce the value of her public lands, and deprive her citizens of their rights and privileges as citizens of the United States.

There are many other averments in the bill of complaint in the Louisiana case, to which it is not necessary to refer at greater length. The bill concluded, in that case, with the prayer that a preliminary injunction be issued, prohibiting, enjoining and restraining the State of Texas and all her officers, agents, and employees, from establishing, maintaining and enforcing, under guise of a quarantine against yellow fever, any embargo of absolute prohibition upon interstate commerce between the State

of Louisiana or any part thereof and the State of Texas, etc., and that such injunction be made perpetual upon final hearing.

To the bill of complaint in that case the defendants interposed a demurrer, which demurrer is substantially the same in most respects, as that which Defendants have filed in the case at bar.

This Court sustained the demurrer in the Louisiana case, and dismissed the bill. The opinion in that case contained the following language to which we call the especial attention of the Court, as being applicable to the case at bar:

"But in order that a controversy between States, justiciable in this Court, can be held to exist, something more must be put forward than that the citizens of one State are injured by the maladministration of the laws of another. The States cannot make war, or enter into treaties, though they may, with consent of Congress, make compacts and agreements. When there is no agreement, whose breach might create it, a controversy between States does not arise unless the action complained of is State action, and acts of State officers in abuse or excess of their powers cannot be laid hold of as in themselves committing one State to a distinct collision with a sister State."

Reference is had to the entire opinion of the Court in the Louisiana case as sustaining the demurrer of defendants in the case at bar. In our opinion the Bill of Complaint in the Louisiana case presented much stronger grounds for invoking the original jurisdiction of this Court than are contained in the complaint in the case at bar. If this Court adheres to the doctrine announced in the Louisiana case, it must sustain the demurrer in this case.

THE STATE OF MISSOURI NOT A PARTY IN INTEREST.

The 2d, 3d, 4th, and 5th grounds for demurrer are to the effect that the State of Missouri is not a proper party

in interest in this case; that upon the face of the complaint the issue presented is between the State of Illinois and a corporation created by the State, and certain individuals, cities and towns in the State of Missouri; that the suit is attempted to be prosecuted in the name of the State of Missouri, which has in effect loaned its name to said cities and towns and individuals, and that the State is seeking redress for the supposed wrongs of such individuals, cities and towns, and that it does not appear upon the face of the bill that the property rights of the State as a State are involved in the suit, at least not to such an extent as to give this Court original equitable jurisdiction.

It is recited in the Bill of Complaint that if Defendants turn into the Des Plaines River the filth and sewage of the City of Chicago, that it will flow into the Mississippi River within the jurisdiction of Complainant, and that the waters of the said Mississippi River "will of a certainty be poisoned and polluted and rendered wholly unfit and unhealthy for domestic uses, and will render wholly valueless and entirely worthless the various waterworks systems of the towns and cities on the borders of the State of Missouri, and deprive its inhabitants of the right to the use of said River, for drinking and all other domestic, manufacturing and agricultural purposes." From this recital it appears that the injury threatened is, to the cities and towns on the borders of the State of Missouri, and their waterworks systems, and to the inhabitants on the banks of said Mississippi River, who use said waters for drinking and other domestic, manufacturing and agricultural purposes. It is true that the Bill of Complaint states that the State of Missouri will be deprived of its right to the waters of said river, for drinking and other purposes stated. But no fact is alleged which shows that the State of Missouri as a State uses water for drinking

or other domestic, manufacturing or agricultural purposes. The allegation is imperfect and insufficient to show that any injury will result to the State of Missouri as a State. The State does not drink water, the State does not carry on manufacturing or agricultural enterprises, nor does it use the water of the Mississippi River for any domestic purposes. This suit is therefore begun for no other purpose than the protection of the cities, towns and private individuals along the banks of the Mississippi River, in the territory of Complainant.

In the consolidated cases of the State of New Hampshire against the State of Louisiana and others, and the State of New York against the State of Louisiana and others, which were original suits brought in this Court (108 U. S. 76), it was held, "that Article IX of the amendments to the Constitution of the United States, prohibits the Supreme Court from entertaining jurisdiction of a cause in which one State seeks relief against another State on behalf of its citizens, in a matter in which the State prosecuting has no interest of its own, unless the State prosecuted consents thereto." And further, "that one State cannot create a controversy with another State within that term as used in the judicial clause of the Constitution." In these consolidated cases, it appeared that the States of New Hampshire and New York had each passed an act by their respective legislatures, to the effect that any citizens of the State holding a written obligation of another State to pay money which was past due and unpaid, might assign the claim to the State, and upon such assignment being made, the Attorney General was authorized to institute an original suit in the name of the State against the State which issued the written obligation, for the recovery of the money due upon the claim. In that case this Court by Mr. Chief Justice

Waite, stated as follows: "This State (N. Y.), as well as New Hampshire, is nothing more nor less than a mere collecting agent of the owners of the bonds and coupons, and while the suits are in the names of the State, they are under the actual control of individual citizens and are prosecuted, and carried on as though by and for them." The bill in each of those cases was dismissed. And in the case at bar, it may be said with equal force, the State of Missouri although the suit is in its name is acting merely as the agent of cities and towns and private individuals, to whom other courts than this as a court of original jurisdiction are open for the redress of whatever grievances they may have.

As was stated in the opinion of this Court by his honor, Mr. Chief Justice Fuller, in the case of the State of Louisiana *v.* The State of Texas *et al.*, handed down January 15th, at this term of court, referring to the bill in that case: "It is in this aspect that the bill before us is framed. Its gravamen is not a special and peculiar injury, such as would sustain an action by a private person, but the State of Louisiana presents herself in the attitude of *parens patriæ*, trustee, guardian, or representative of all her citizens." It is precisely in this attitude that the State of Missouri presents itself in the case at bar. In that case the demurrer was sustained and the bill dismissed.

See also, the recent case, *In Re* Hartung, 98 Wisconsin, 140; 73 N. W. 988.

Wheeling Bridge Case.

Among the cases cited by counsel for Complainant, in support of the motion for leave to file the Bill of Complaint in this case, is that of the State of Pennsylvania *v.* The Wheeling and Belmont Bridge Co., *et al.*, (13 How.

518). In that case, as counsel for Complainant contends, "this Court enjoined the building of a bridge over the Ohio River, fifty miles beyond the territory of the State of Pennsylvania, which was being constructed under color of the Statutes of Virginia." The opinion of this Court in that case does not sustain the contention of the Complainant in the case at bar. In that case the opinion was delivered by Mr. Justice McLean, and there were dissenting opinions by Chief Justice Taney and Mr. Justice Daniel. The opinion in that case states that it appears from the bill filed, that the State of Pennsylvania owned certain valuable public works, canals and railways, constructed at great expense, as channels of commerce, for the transportation of passengers and goods, from which a large revenue as tolls, was received by the State; that these works depended on the Ohio River, and were constructed with direct reference to its free navigation; that the goods and passengers transported on these lines were conveyed on steamboats on the Ohio River; and that the Wheeling bridge would so obstruct the navigation of the River as to divert trade and business from the public works of Pennsylvania, impair and diminish the tolls and revenues of the State, and render its improvements useless. The answer of the defendants in that case, admitted the State of Pennsylvania had expended large sums of money in construction of public improvements terminating at Pittsburg and Beaver; that a great amount of freight and a large number of passengers did pass over said works, and that a large amount of tolls to the State is derived therefrom; that the navigation of the Ohio River is important to the works above referred to; and that the value thereof would be affected injuriously, if from any cause the passage of steamboats from the City of Pittsburg downward were obstructed or impeded. The

court pointed out the public works which the State of Pennsylvania had erected, as follows:

"It appears that the State of Pennsylvania has constructed an open line of canal and railroad from Pittsburg and Alleghany City to the City of Philadelphia, a distance of about 400 miles, at an expense of about sixteen millions of dollars, all of which are owned by the State. There is also a railroad from Pittsburg to Harrisburg, which will soon be completed, at an expense of some eight or ten millions of dollars. There is also slack-water navigation from Pittsburg to Brownsville, and from Yaughegany to West Newton, and there are other lines of communication between Pittsburg and the East, which are owned in whole or in part by the State, and from which it derives revenue."

The Court held in that case, that, "The rights asserted and relief prayed, are considered as in no respect different from those of an individual. From the dignity of a State, the Constitution gives the right to bring an original suit in this Court, and this is the only privilege, if the right be established, which the State of Pennsylvania can claim in the present case." And the Court stated further in its opinion, referring to the State of Pennsylvania: "It asks from this Court the protection of its property, on the same ground and to the same extent as a corporation or individual may ask it." The Court found, as a matter of fact, from the evidence which was taken, that, "The bridge obstructs the navigation of the Ohio River, and that the State of Pennsylvania has been and will be, injured in her public works, in such manner as not only to authorize the bringing of this suit, but entitle her to the relief prayed."

The Court in the exercise of its equitable jurisdiction indicated that the obstruction of the navigation of the

River, may be remedied by elevating the bridge, and a modified decree was entered, permitting this to be done. The dissenting opinions of Chief Justice Taney and Mr. Justice Daniel, in this case are able and exhaustive. That of Chief Justice Taney, stated that the Ohio River was a public, navigable stream, and that Congress had undoubtedly the power to regulate commerce upon it; that Congress has the right to prohibit its obstruction or to declare any such obstruction a public nuisance; to direct the mode of proceeding in the courts of the United States to remove it, etc., but the Chief Justice stated that this power had not been exercised; that there is no law of the United States declaring an obstruction in the Ohio River, or any other navigable river to be a public nuisance, and directing it to be abated as such. This Court, however, in its opinion held, that the Ohio River is a navigable stream, of which fact all courts will take cognizance, and that for many years the commerce upon it has been regulated by Congress, by establishing ports, requiring vessels which navigate it, to take out licenses, and to observe certain rules for the safety of passengers and cargoes; and that appropriations by Congress have been frequently made to remove obstructions from its channel. These facts taken in connection with the direct interest of Pennsylvania, were considered sufficient to confer original jurisdiction upon this Court.

The case at bar is in no respect comparable to the Wheeling bridge case. In that case the property of the State of Pennsylvania, which was involved, amounted to over twenty-five millions of dollars, and a positive injury to this property was not only alleged, but admitted. In the case at bar, there is no allegation that the Complainant in this case, the State of Missouri, has any property belonging to the State, which will be injured or damaged

by the apprehended pollution of the waters of the Mississippi River. Nor does it appear that Congress has ever passed any law declaring the pollution of a navigable stream to be a nuisance. Such laws have always been regarded as being within the exclusive police powers of the States, except in the District of Columbia and in the Territories of the United States, over which Congress has complete jurisdiction. Mr. Justice Daniel, in his dissenting opinion in the Wheeling bridge case, said: "There then, can be no nuisance, with respect to the United States, except what Congress shall, in the exercise of some constitutional power, declare to be such; and Congress have not declared an act like that here complained of to be a nuisance." "Believing," Mr. Justice Daniel, stated, "that the question of nuisance or no nuisance, is intrinsically a question of fact, which, when contested, ought to be tried at law, upon the circumstances of each case, and that, before the ascertainment of that fact, a court of equity cannot take cognizance, either for enjoining or abating an act alleged or not proven to be a nuisance," he was of the opinion that the bill of complaint in that case should be dismissed.

In the case of the Willamette Iron Bridge Company *v.* Hatch, 125 U. S., p. 1, this Court held: "There must be a direct Statute of the United States, in order to bring within the scope of its laws, obstructions and nuisances in navigable streams within a State; such obstructions and nuisances being offences against the laws of the States, within which the navigable waters lie, but no offence against the United States in the absence of a Statute." That case came to this Court on appeal from the circuit court of the United States for the District of Oregon. This Court was of opinion that an original suit in that case was not a suit arising under any law of the

United States, and since on such ground alone the court below could have had jurisdiction of it, it followed that the decree of the court below must be reversed and the suit dismissed. It is true that the Willamette River was wholly within the State of Oregon, and Congress having passed no law in reference to obstruction of a navigable stream within a State, this Court held that a United States court did not have jurisdiction of the case, as no law of Congress was involved. In the case at bar, the alleged threatened pollution of a navigable stream, relates to a river which is the boundary line between the States of Illinois and Missouri. There is no allegation that the navigation of the Mississippi River will be obstructed by the threatened acts of Defendants, and the allegation as to the pollution of the stream, is that the waters where the pollution will take place are wholly within the State of Missouri, as far as the center of the channel.

Not a Direct Issue Between Two States.

In the case of the State of Pennsylvania *v.* Wheeling Bridge Co., *supra*, there were as above stated, two dissenting opinions, one by Chief Justice Taney, the other by Mr. Justice Daniel. The Chief Justice, in his dissenting opinion said: "The bridge has been erected and completed without any previous injunction to restrain respondents from proceeding in the cause. It is charged to be a public nuisance. But Pennsylvania has no right to proceed against it wholly on that account. She proceeds and is entitled to proceed only for a private and particular injury to her property, which this public nuisance has occasioned." Mr. Justice Daniel, in his dissenting opinion, page 596, said: "I conclude therefore, that to constitute a State a party in that sense which brings her

within the meaning of the Constitution, and indeed within the import of the term, party to a cause, by all correct legal intendment there must be averred and proved on her behalf, a certain and direct interest, or an injury, or a right of property—a perfect right—a right which a court of justice can define, adjudge, and enforce; and that on the part of the State of Pennsylvania no such right having been averred even, much less established in proof, nothing is shown which can maintain the jurisdiction of this Court in this cause. The shadowy pretext of an interest or injury, from the nature of things not susceptible of calculation or estimate, can never be the foundation of a right, legal or equitable."

These two dissenting opinions do not, to the extent we have quoted them, assert a principle contrary to that laid down by this Court, for it is stated in the opinion of this Court in the case of Wisconsin *v.* Pelican Ins. Co., 125 U. S. 295, that all the judges who took part in the decision in the Wheeling bridge case, treated the suit as brought to protect the property of the State of Pennsylvania.

Mr. Justice McLean, delivering the opinion of the Court, said that Pennsylvania asks from this Court the protection of its property on the same ground and to the same extent as a corporation or individual may ask it. It was stated in the opinion of the Court, that the bridge over the Ohio River, was constructed under a Statute of Virginia, in violation of a compact of the State of Virginia with the State of Kentucky, and that the compact was confirmed by the Act of Congress, providing for the admission of Kentucky into the Union as a State. But the Court treated the case as one brought to protect the property of the State of Pennsylvania. In this connection we beg pardon for again referring to the case of the State of Louisiana against the State of Texas, decided at this term of court. In the

opinion, handed down by his honor, the Chief Justice, in that case, it is stated as follows: "In the absence of agreement it may be that a controversy might arise between two States for the determination of which the original jurisdiction of this Court could be invoked, but there must be a direct issue between them, and the subject-matter must be susceptible of judicial solution. But it is difficult to conceive of a direct issue between two States in respect to a matter where no effort at accommodation has been made; nor can it be conceded that it is within the judicial function to inquire into the motives of a State legislature in passing a law, or of the Chief Magistrate of a State in enforcing it in the exercise of his discretion and judgment. Public policy forbids the imputation of their official action to any other than legitimate motives."

Upon a careful examination of the Bill of Complaint in the case at bar, it will be difficult to ascertain that a direct issue between two States is presented. Nor will it be conceded that it is within the judicial function of this Court to inquire into the motives of the legislature of the State of Illinois in passing the law under which the Sanitary District of Chicago was created, or of the Chief Magistrate in enforcing that law in the exercise of his discretion and judgment. The State of Illinois and the officers of the Sanitary District of Chicago, acting under the authority of the State in a matter which is conducive to the health of the people, ought not to be enjoined or restrained by this Court in the exercise of their lawful authority.

The Bill of Complaint does not show that any direct issue between the State of Missouri and the State of Illinois has been alleged, which entitles the Complainant to invoke the original jurisdiction of this Court.

No Special Injury Alleged.

In the case of the State of South Carolina *v.* The State of Georgia *et al.* (93 U. S. p. 4), the Complainant filed a bill in equity in this Court, praying an injunction restraining the State of Georgia, Alonzo Taft, Secretary of War, and the Engineer officers of the Army, and their agents, from obstructing or interrupting the navigation of the Savannah River, in violation of the compact entered into between the States of South Carolina and Georgia, on the 24th day of April, 1787. The Secretary of War was making certain improvements in the channel of the Savannah River, in pursuance of appropriations by Congress, and the State of South Carolina endeavored to enjoin the making of these improvements, on the ground that they obstructed or interrupted the navigation of the Savannah River. This Court held that the defendants were acting within the authority of acts of Congress, and that no illegal obstruction existed. The opinion states as follows: "The plaintiff has therefore made no case sufficient to justify an injunction, even if the State is in a position to ask for it. But in resting our judgment upon these grounds, we are not to be understood as admitting that the State, when suing in this Court for the prevention of a nuisance in a navigable river of the United States, must not aver and show that it will sustain some special and peculiar injury therefrom, such as would enable a private person to maintain a similar action in another court. Upon that subject we express no opinion. It is sufficient for the present case, to hold, as we do, that the acts of the defendants, of which South Carolina complains, are not unlawful, and consequently there is no nuisance against which an injunction should be granted."

The special injunction theretofore ordered was dissolved and the bill was dismissed.

The point upon which no opinion was expressed, is so stated as to permit the inference that a State when suing in this Court for the prevention of a nuisance in a navigable river of the United States, must aver and show that it will sustain some special and peculiar injury therefrom, such as would enable a private person to maintain a similar action in another court. Subsequent opinions of this Court support this inference. There are no averments in the Bill of Complaint in the case at bar, which show that the State of Missouri will sustain any special and peculiar injury on account of the threatened action of Defendants. The allegation in the complaint is, that the State of Missouri and its inhabitants will be deprived of the right to the use of the waters of the said Mississippi River, for drinking and other domestic, manufacturing and agricultural purposes, and that the health and the lives of the inhabitants of the State of Missouri will be endangered and the business interests of said State will be greatly and irreparably injured. This allegation is a mere conclusion of law and not a statement of facts, upon which this Court might conclude that such might be the result of the acts complained of.

COMPLAINANT NOT ENTITLED TO EQUITABLE RELIEF.

If this Court should hold that it has original jurisdiction of the case at bar, the allegations in the Bill of Complaint are not sufficient to entitle the State of Missouri to the equitable relief prayed for, in said Bill of Complaint.

In support of this position, counsel for Defendants call the attention of this Court to their brief filed herein, in support of their objections to the granting of a preliminary or temporary injunction in this case.

It will not be contended in this case that the mere fact of the drainage of the City of Chicago into the Des Plaines River is a nuisance, *per se*, to the cities and towns and inhabitants of the State of Missouri, below the mouth of the Illinois River, a distance of over three hundred miles. Such drainage may or may not become a nuisance to the inhabitants, cities and towns of Missouri, according to circumstances; and the injury apprehended by Complainant is merely eventual or contingent; and no injury whatever may in fact be inflicted upon the cities, towns and inhabitants of the Complainant.

The acts of the Sanitary District of Chicago have all been done and performed in pursuance of law as alleged in the Bill of Complaint. It is a general rule that where the act complained of is not a nuisance, *per se*, or may or may not become so, according to circumstances, and the injury apprehended is eventual or contingent, equity will not interfere. The presumption is, that a person entering into a legitimate business, will conduct the same in a proper way, so that it will not constitute a nuisance. (See, Ramsey *v.* Riddle, 1 Cranch, (C. C.) 399; Spooner *v.* McConnell, 1. McLean (U. S.) 337; Laughlin *v.* Lamasco City, 6 Ind. 223; Hahn *v.* Thornberry, 7 Bush. (Ky.) 403; Pfingst *v.* Senn. 94 Ky. 556; Green *v.* Lake, 54 Miss. 540; Butler *v.* Rogers, 9 N. J. Eq. 487; Ross *v.* Butler, 19 N. J. Eq. 294; Cleveland *v.* Citizens Gaslight Co., 20 N. J. Eq. 201; Rochester *v.* Curtis, Clarke Cht. (N. Y.) 336; Stillwell *v.* Buffalo Riding Acd., 21 Abb. (N. Y. S. Ct. 472) N. Cas.; Ellison *v.* Washington, 5 Jones Eq. (N. C.) 57.)

In Ripon *v.* Hobart, 3 Myl. & K. 177, Lord Chancellor Brougham, said that, "no instance can be produced of interposition by injunction, in case of an eventual or contingent nuisance."

In Hough *v.* Doylestown Borough, 4 Brews. (Pa.) 333, it was held that in order for equity to enjoin a private nuisance, the danger must be impending or imminent and the fact certain, not resting on hypothesis or conjecture, but established by conclusive evidence. If the injury be doubtful, eventual or contingent, or if the matter complained of is not, *per se*, a nuisance, an injunction will not be granted. In cases of prospective nuisances, a court of equity will not interfere, unless the damage to be apprehended will be serious, nor when upon balancing the inconveniences or injuries, greater injury will be inflicted by granting than by refusing an injunction."

WHEN ORIGINAL JURISDICTION CANNOT BE INVOKED.

As stated heretofore, the mere fact that a State is a party to a suit as plaintiff or complainant and another State is defendant, does not present a case for the original jurisdiction of this Court. In the case of the State of Mississippi *v.* Johnson, 4 Wall. 476, a bill was filed by the State of Mississippi against Andrew Johnson, President of the United States, seeking to restrain him from enforcing certain acts of Congress. This Court refused to entertain the case because the Court had no jurisdiction of the bill to enjoin the President in the performance of his official duties.

In the case of the State of Georgia against Staunton, Secretary of War, and General Grant and others, a similar decision was made in a similar case. This Court held, that the case presented a political and not a judicial question, and that it had no jurisdiction over the subject-matter presented in the bill.

In the case of the State of Wisconsin *v.* Pelican Ins. Co., *supra*, this Court held, that a State could not bring

an original suit in the Supreme Court against the citizens of another State, for the recovery of a penalty imposed by the laws of a State.

In the consolidated cases of New Hampshire *v.* Louisiana, and New York *v.* Louisiana, *supra*, this Court held, that one State cannot create a controversy with another State within the meaning of the term as used in the judicial clause of the Constitution, by assuming the prosecution of debts owing by another State to its citizens.

This Court has not original jurisdiction in a case in which one State may bring a suit against another or against citizens of another State, unless the complaining State shall aver and prove a certain and direct interest or injury or a right of property which a court of justice can define, adjudge and enforce.

When Original Jurisdiction Can Be Invoked.

In the case of the State of Texas *v.* White *et al.*, 7 Wall. 700, this Court took original jurisdiction on the ground that Texas was at that time (during the reconstruction period), a State and entitled to sue in the Supreme Court as such.

In the case of the State of Florida *v.* Anderson *et al.*, 91 U. S., p. 667, this Court took original jurisdiction on the ground that, that State had a statutory lien on the bonds of certain railroads and that it was competent for the State, in order to protect that interest, to obtain equitable relief in this Court against citizens of another State.

Title to the Bed of the Mississippi River.

Counsel for Complainant in this case contend that by reason of the fact that the title to the bed of the Missis-

sippi River to the middle of the main channel, is in that State, and that by reason of the fact that the State of Missouri has jurisdiction to the middle of the channel, that it is therefore within the power of the State, "to protect these waters from pollution, in order to preserve the health of her citizens, and to protect the soil of the bed of the stream from having large deposits of sewage, filth and noxious matters drained from the City of Chicago and deposited upon the bed of the stream, to the detriment both of the bed of the stream and the waters thereof."

It is alleged in the Bill of Complaint that great quantities of the sewage of the Sanitary District of Chicago will be daily carried through the artificial channel, constructed by Defendants and sent through the Des Plaines and Illinois Rivers and into the Mississippi River, and that great quantities thereof will be deposited in the bed and soil of said river, belonging to the State of Missouri, and wholly within the jurisdiction thereof, to the great and irreparable damage of the State of Missouri, and that the sewage and filth about to be injected into said waters and into the portion thereof over which the State of Missouri has jurisdiction, and from which thousands of her inhabitants obtain drinking water, will be deposited in the bed of said river, and that the waters thereof will be polluted and poisoned to such an extent as to render them unwholesome and unhealthy for use for drinking by said inhabitants in the territory of Complainant, and unfit for use for watering stock and for manufacturing purposes. The allegation is that this sewage so turned into the waters of the Mississippi River will be to the great and irreparable damage of Complainant. The injury alleged, is to the inhabitants of the State of Missouri. There is no allegation setting forth facts from which this Court

could infer that great and irreparable damage would be done to the State of Missouri as a State. The specific allegations of damage are to the individual inhabitants, and cities and towns and waterworks systems which these cities and towns have erected. The State of Missouri is merely lending its name to private individuals and municipalities in the State. The State has no direct, special, or peculiar interest to be protected. A State cannot create a controversy with another State, or with the citizens of another State, so as to entitle it to invoke the original jurisdiction of this Court, by assuming the prosecution of suits for the benefit of its individual citizens. (N. H. *v.* La., and N. Y. *v.* La., 108 U. S. p. 91.)

The attention of this Court is called to the fact that the allegations in the Bill of Complaint are in reference to threatened injury only. There is no allegation that any injury has been suffered by the State or by the inhabitants, or by the cities and towns in the State of Missouri, or that any noxious matter has been deposited in the bed of the Mississippi River. The allegations of prospective injury are merely expressions of opinion. In the case of Thebaut *v.* Canova, 11 Fla. 143, the Supreme Court of Florida, in a similar case, held, as follows: "Where the bill for an injunction alleged that a steam-mill, if put into operation, would unavoidably and in itself become a nuisance, this allegation was held to be nothing but the expression of an opinion by the plaintiff, upon which the Court could not retain the injunction, but should leave the parties to their remedy at law."

Remedy for a Nuisance.

The proper and usual remedy for a nuisance, which is purely local in its character, is by indictment, brought on

behalf of the public by the proper officer. (See 14 Encyc. of P. & P. p. 1093, and cases therein cited, in the States of Arkansas, California, Delaware, Illinois, Iowa, Kentucky, Maine, Massachusetts, New Jersey, New York, South Carolina, and Virginia.)

However, it is considered that in proper cases, equity will take jurisdiction of suits to suppress public nuisances, and actions at law for damages occasioned by nuisances may be prosecuted. Cases of this latter class are designated as trespasses on the case. The injuries complained of are not called trespasses, but have the general name of torts, wrongs, or grievances. In action on the case, in general, the general issue is, "not guilty," and it is pleaded by stating that the defendant comes and defends the wrong and injury, when, etc., and says that he is not guilty of the premises above laid to his charge."

The nuisance alleged in this case is an offence against the laws of the State of Missouri. If there be no statute of that State upon the subject, it would be a common-law offence in that State, punishable in the local courts. A nuisance is not an offence against any law of the United States. There is no federal law making a nuisance a crime, and the federal Government has no jurisdiction of offences at common law. (United States *v.* Lancaster, 2 McLain (U. S.) 431.) The United States can exercise no criminal jurisdiction which is not given by statute, nor punish any act criminally, except as the statutes provide, *ib.* The federal courts have no common law criminal jurisdiction. (See Encyc. of American and English Law, 2d Ed. 289, and numerous authorities therein cited in Note 6.)

The case of Wisconsin *v.* Pelican Ins. Co., *supra*, was an action brought upon a judgment recovered by the State of Wisconsin in one of her own courts, against the Peli-

can Ins. Co., a Louisiana corporation, for penalties imposed by the statutes of Wisconsin, for not making returns to the Insurance Commissioner of the State, as required by that statute. This Court held that that case was not a civil controversy; that the statute under which it arose was in the strictest sense penal, imposing a penalty upon any insurance company doing business in the State of Wisconsin, without having deposited with the proper officer of the State a full statement of its property and business during the previous year. The cause of action, as stated by this Court, was not a private injury, but solely an offence against the State, by violating her laws. The prosecution was in the name of the State, and the penalty would accrue to the State and to the Insurance Commissioner. This Court in its opinion in that case said: "The real nature of the case is not affected by the forms provided by the law of the State for the punishment of the offence. It is immaterial whether imposed by indictment or by action; or whether, under that law, a judgment there obtained for the penalty might be enforced by execution, by *scire facias*, or by a new suit. In whatever form the State pursues her right to punish the offence against her sovereignty, every step of the proceeding tends to one end, compelling the offender to pay a pecuniary fine by way of punishment for the offence. * * * If this Court has original jurisdiction of the present case, it must follow that any action upon a judgment obtained by a State in her own courts against a citizen of another State, for the recovery of any sum of money, however small, by way of a fine for any offence, however petty, against her laws, could be brought in the first instance in the Supreme Court of the United States. That cannot have been the intention of the Convention in framing, or of the people in adopting, he Federal Constitution."

In the case at bar, the form of the action is a suit in equity to enjoin the wrongs and injuries which it is alleged will be inflicted upon the Complainant by Defendants. The acts complained of are criminal in their nature, and as stated by this Court in the Wisconsin case, it is immaterial whether the prosecution is by indictment or by an action, civil in form. In whatever form the State pursues, the object is to compel the offender to pay a pecuniary fine by way of punishment for the offence, or as in the case at bar, to enjoin the Defendants from committing the wrongs and injuries against the State of Missouri, which if committed would be in violation of the laws of the State. If this suit were an action at law to recover damages for wrongs and injuries actually done and suffered by reason of the alleged nuisance, the Plaintiff's right to recover would depend upon the fact as to whether the acts complained of and proven, were in violation of the criminal statutes of the State. The proceeding in whatever form it may be instituted, for the suppression or abatement of a public nuisance, is essentially criminal in its character. It is in no sense a civil controversy, and under the rule laid down in the Wisconsin case, this Court has not original jurisdiction in such a case.

If this Court has original jurisdiction of the case at bar, it would follow that any State of the Union might invoke the original jurisdiction of this Court in all cases wherein it could be alleged that citizens of or corporations created by another State were committing or threatening to commit any nuisance by pollution of the waters of navigable streams in the State, by the erection of manufacturing establishments or otherwise. If a syndicate outside of Missouri should purchase the breweries in St. Louis, or the slaughter houses at Kansas City, and should discharge the drainage therefrom into the Mississippi or Missouri

Rivers, the State of Missouri might invoke the original jurisdiction of this Court to restrain the nuisance created thereby, if it can maintain the case case at bar. As was stated by this Court in the Wisconsin case, that cannot have been the intention of the Convention in framing, or of the people in adopting, the Federal Constitution. Such an enlargement of the original jurisdiction of this Court would invite a multiplicity of suits in this Court, such as was never contemplated by those who framed the Federal Constitution.

The distinction between civil controversies and criminal actions is not well defined. Mr. Bishop, in his work on Criminal Law, says: "Whenever the public deems that an act of wrong to individuals is of such a nature as to require the public protection to be cast over the individual, with respect to the act, it makes the act punishable by the public; or in other words, it makes it a crime." (1 Bishop, Cr. Law, Secs. 532, 533, 2d Ed.) Acts may be both crimes and torts. If torts only, the individual may obtain redress for damages sustained. If crimes, the individual may obtain redress for the injury, and the act may be punished as a crime. If the act may be punished as a crime, it is essentially criminal, and this character attaches to it, in whatever form it may be redressed or punished.

The nuisances alleged in the Complaint as threatened by Defendants, are criminal in their character, and it is their criminal character only that entitles the State to suppress them. The right of the State to appear in the case at bar, is based upon the criminal act with which the public are threatened. If it were not a public wrong, the State could not appear, and if it be a public wrong, it is a criminal proceeding, which cannot be prosecuted in this Court. If the acts were torts, the individuals injured would alone have the right to maintain an action, and

they could not sue in this Court. Hence it appears that the only ground upon which the State can stand, in this case, is that a public wrong, which is a crime, is threatened. And standing upon that ground, the original jurisdiction of this Court cannot be invoked, for the purpose of suppressing the wrong or for preventing the alleged threatened nuisance.

The case of the State *v.* Patterson *et al.*, decided in the Court of Civil Appeals in the State of Texas, was on a bill of equity by the State of Texas against Patterson and others, to abate by injunction the keeping of a public gambling house. The Court of Civil Appeals held, in that case: "It is not shown that any property or civil rights of the public, which it is the duty of the State to protect, are invaded, or that any irreparable injury will be done to any such rights by the maintenance of such nuisance. The case presented is a criminal one pure and simple, in which the criminal law furnishes the only remedy which the courts are required to enforce." 37 S. W. Rep'r, p. 479.

Want of Proper Parties.

In the case of the State of California *v.* Southern Pacific R.R. Co. 157 U. S., pp. 229 to 271, this Court held, that original jurisdiction in the Supreme Court could not be exercised if there were other parties in interest, who were not made parties, and who if they were made parties, would oust the court of its original jurisdiction. In the case at bar, it appears upon the face of the Bill of Complaint that there are other parties in interest in this case, namely, cities and towns and individuals in the State of Missouri, whose property will be injured by the threatened acts of Defendants. But if such other parties were

made parties plaintiff, the plaintiffs could not maintain an original suit in this Court. Hence if the parties in real interest should be made parties, the original jurisdiction of this Court would be ousted.

A Case Without a Precedent.

The cases in which the original jurisdiction of this Court have been invoked heretofore by a State for the purpose of enjoining or restraining nuisances, are very few in number. The Wheeling Bridge case, *supra*, is one of such cases and the case of South Carolina *v.* Georgia, 93 U. S. p. 4, is another. In the latter case the State of South Carolina sought to enjoin the obstruction of the navigation of the Savannah River. The case of Wisconsin *v.* Duluth, 96 U. S. 381, was for the purpose of enjoining the obstruction and diversion of the St. Louis River from its natural course. In these three cases above mentioned, the nuisance alleged was that interstate commerce would be interfered with or prevented.

The case at bar is without precedent. No case has heretofore been brought originally in this Court by a State against another State or against citizens of another State, in which the complainant sought to restrain by injunction a nuisance resulting from the pollution of the waters of a navigable stream. That kind of a nuisance has heretofore been left to the determination of the local courts. If this Court should entertain jurisdiction of this case, it will be the first of its kind which has appeared in this Court, after more than one hundred years of its existence; and it will open up a new and extensive field of litigation in this Court.

Cases Cited by Counsel for Complainant.

Among the cases cited by counsel for Complainant in support of their contention that this Court has original jurisdiction in the case at bar, is the case of the Cherokee Nation *v.* State of Georgia (5 Pet. p. 1). The Cherokee Nation, claiming to be a foreign State, brought an original suit in the Supreme Court of the United States, at the January term, 1831, against the State of Georgia. In this case the Cherokee Nation prayed for an injunction to restrain the State of Georgia from the forcible exercise of legislative power over neighboring people, and from enforcing certain laws of that State. The opinion was delivered by Chief Justice Marshall, three of the Judges of the Court dissenting, and one other concurring in the opinion of the Court in dismissing the bill, but upon other grounds than those cited in the opinion. Counsel for Complainant were unfortunate in citing this case in support of their contention. In the opinion of the Court, Chief Justice Marshall, said: "The bill requires us to control the legislature of Georgia, and to restrain the exertion of its physical force. The propriety of such an interposition by the court may be well questioned. It savours too much of the exercise of political power, to be within the proper province of the judicial department. But the opinion on the point respecting parties, makes it unnecessary to decide this question. If it was true, that the Cherokee Nation have rights, this is not the tribunal in which those rights are to be asserted. If it be true that wrongs have been inflicted, and that greater wrongs are to be apprehended, this is not the tribunal which can redress the past or prevent the future. The motion for an injunction is denied."

This Court in determining the question raised by the Bill of Complaint in the case at bar, may, with equal force, hold, in the language of Chief Justice Marshall in the Cherokee case, that the propriety of controlling the legislature of Illinois, by an injunction may be well questioned, and that if it be true that the State of Missouri has rights, this Court is not the tribunal in which those rights are to be asserted. If it be true that wrongs have been inflicted upon the State and that still greater wrongs are to be apprehended, this is not the tribunal which can redress the past or prevent the future. The motion for an injunction in this case should be denied, as in the Cherokee case.

Another federal case cited by counsel for Complainant in support of their contentions in this case, is that of the State of Rhode Island *v.* The State of Massachusetts, 12 Peters, 657. In that case this Court held, as follows:

"The Supreme Court has jurisdiction of the bill filed by the State of Rhode Island against the State of Massachusetts to ascertain and establish the northern boundary between the States, that the rights of sovereignty and jurisdiction be restored and confirmed to the plaintiff; and that they be quieted in the enjoyment thereof and their title." There has never been any question raised in this Court as to its original jurisdiction in cases affecting the boundary between two States.

Another case cited by counsel for Complainant in support of their contentions in this case, is that of the Mayor, etc., of Georgetown, against the Alexandria Canal Co. *et al*, 12 Pet. 91. This case was begun in the circuit court of the United States for the County of Washington in the District of Columbia, and was brought to this Court on appeal. It was not a case in which the original jurisdiction of this Court was invoked. This Court held, in that case, as follows: "The Potomac River is a navigable

stream, or part of the *jus publicum ;* and any obstruction of its navigation would, upon the most established principles, be a public nuisance. A public nuisance being the subject of criminal jurisdiction, the ordinary and regular proceeding at law is by indictment or information, by which the nuisance may be abated, and the person who causes it may be punished. A court of equity may take jurisdiction in cases of public nuisance, by an information filed by the Attorney General. If any particular individual shall have sustained special damage from the erection of it, he may maintain a private action for such special damage ; because to that extent he has suffered beyond his portion of injury, in common with the community at large. While it is admitted by all that the jurisdiction of a court of equity, in cases of nuisance, is confessedly one of delicacy, and accordingly the instances of its exercise are rare ; yet it may be exercised in those cases in which there is imminent danger of irreparable mischief, before the tardiness of the law could reach it."

That case having been brought in an inferior court, cannot be cited as authority for invoking the original jurisdiction of this Court in the case at bar. It may be stated, however, that under certain conditions and circumstances, a court of equity having jurisdiction will interpose to prevent imminent or irreparable mischief. The bill of complaint in that case was to the effect, that the plaintiffs were deeply interested in the trade and navigation of the Potomac River, and it alleged that the defendants were engaged in constructing an aqueduct over that river. The plaintiffs expressed fears that the work would injure the harbor of the town and the channel of the river. It prayed a preliminary injunction against the defendants and against the progress of the work so conducted. The answer of defendants denied the right of

the appellants to sue and the jurisdiction of the court to enjoin for a public nuisance; and to give the relief prayed; and denied that there was any injury or damage. There were many other questions raised in the complaint and in the answer. The court below refused to grant the injunction and the relief prayed, and dismissed the bill. This Court affirmed the decree of the court below. We are unable to see wherein that case supports the contention of the Complainant in the case at bar. If the principle announced by the Court in that case should be applied to the case at bar, this Court would hold that the ordinary and regular proceeding in reference to a public nuisance, is by indictment or information, by which the nuisance may be abated and the persons who cause it may be punished. That a court of equity having jurisdiction of the parties and the subject-matter, may take jurisdiction in cases of public nuisance, by information filed by the Attorney General. This, of course, would be in the local courts where the nuisance was alleged to exist. The individual citizens of the State of Missouri, who may have sustained special damages from the alleged nuisance, may maintain a private action for such special damages; but under no circumstances can the doctrine laid down by the Supreme Court in that case be made applicable to the case at bar.

Counsel for Complainant cite the case of Wisconsin *v.* Duluth. This case was brought originally in the Supreme Court. That suit was brought by the State of Wisconsin, on the ground that the channel of the St. Louis River, as it flowed in its natural course, was the boundary between that State and the State of Minnesota, and that State has an interest in the continuance of the channel as an important highway for navigation and commerce in its natural and usual course. That a certain canal cut

by the City of Duluth was deeper than the natural outlet of the St. Louis River at its mouth, and had diverted and will divert the current of that river through Superior Bay. This Court held in that case, that, where Congress has in the exercise of its lawful authority, inaugurated and adopted a system of improvements of a harbor, and is, by appropriating the public monies, carrying it out, this Court has no authority to prescribe the manner in which the work shall be conducted, or to forbid its completion, or to require the undoing of that which has been done. This Court accordingly held that the State of Wisconsin was not entitled to the relief prayed for in her bill, and that it must therefore be dismissed with costs, and it was so ordered. Again we fail to see wherein that case supports the contention of counsel for the Complainant in the case at bar. It is true that this Court took jurisdiction in that case and heard it upon its merits, upon the allegation contained in the complaint, that the boundary line between the State of Wisconsin and the State of Minnesota was being changed by the channel which was being cut by the City of Duluth. The Court therefore had jurisdiction to determine whether the boundary line of the State was being changed.

Another case cited by counsel for Complainant, in support of their contentions in this case, is that of the Mayor of New Orleans against the United States, 10 Peters, 662. This case was brought in the district court for the Eastern District of Louisiana by petition of the United States, in which an injunction was prayed against the Mayor, to restrain him and the aldermen and inhabitants of New Orleans from invading the rightful domain and possessions of the United States in certain lands lying between certain streets and a public road in the City of New Orleans. An injunction was ordered and an appeal was

prayed to the Supreme Court. The opinion of the Court was delivered by Mr. Justice McLean, in which he stated as follows: "The Government of the United States, as was well observed in the argument, is one of limited powers. It can exercise authority over no subjects, except those which have been delegated to it. Congress cannot by legislation, enlarge the federal jurisdiction, nor can it be enlarged under the treaty-making power." It was held by the Court, that, "no jurisdiction of the Federal Government, either for purposes of police or otherwise, can be exercised over this public ground which is not common to the United States. It belongs to the local authorities to enforce the trust and prevent what they shall deem a violation of it by the city authorities," that, "neither the fee of the land in controversy, nor the right to regulate the use, is vested in the Federal Government."

The decree of the District Court was reversed and the case remanded. We are unable to see wherein this case supports in any manner the contentions of counsel for Complainant in the case at bar.

Another federal case cited by counsel for Complainant in support of their contention, is that of the State of Georgia *v.* Brailsford *et al.* (2 Dall. 400). In this case the State of Georgia brought an original suit in this Court for the purpose of recovering certain debts due by citizens of Georgia to British subjects, which had been confiscated by virtue of acts of the legislature of Georgia, passed during the Revolutionary War. All the Justices of the Supreme Court delivered opinions in the case on the question of granting the injunction. Chief Justice Jay, in his opinion, said: "Then the only point to be considered, is whether, under these circumstances, it is not equitable to stay the money in the hands of the Marshal, until the right to it is fairly decided; and so avoid the risk of put-

ting the true owner to a suit for the purpose of recovering it back? For the time being, I think the money should remain in the custody of the law, until the law has adjudged to whom it belongs; and therefore I am content that an injunction issue." A preliminary injunction was issued.

At the February term of the Court, 1793, upon the motion to dissolve that injunction, this Court held that if the State of Georgia had a title in the debt (upon which no opinion was then expressed), she had an adequate remedy at law, by action upon the bond; but in order that the money might be kept for the party to whom it belonged, ordered the injunction to be continued to the next term; and, if Georgia should not then have instituted her action at common law, to be dissolved (2 Dall. 415). Such an action was brought accordingly and was tried by a jury at the bar of this Court, at the February term, 1794, when the Court was of the opinion, and so charged the jury, that the act of the State of Georgia, did not vest the title in the debt in the State at the time of passing it, and that by the terms of the act the debt was not confiscated, but only sequestered, and the right of the obligees to recover it revived on the Treaty of Peace; and the jury returned a verdict for the defendants, 3 Dall., 1, 2, and 3. (See Wisconsin *v.* Pelican Ins. Co., 127 U. S. p. 295.)

The law case was tried by a jury upon an amicable issue, to ascertain whether the debt in controversy belonged to the State of Georgia, or to the original creditors. The trial at law upon the merits, is reported in 3 Dal. pp. 1, 2, 3 and 4.

In the report of the proceedings of the law case, it is stated that the argument continued for four days, when the Chief Justice delivered his charge to the jury. Under the

instructions of the Court, upon the law of the case, the jury returned a verdict for the defendants. This Court took original jurisdiction, both in the equity and the law case, upon the ground that it was a suit between a State and citizens of a foreign State. The State of Georgia failed in the equity case, because it had a remedy at law, and it failed in the law case because it failed to show a right to recover, the title not having vested in the State. And the Complainant in this case should fail, for the reason that by its Bill of Complaint, it does not state facts which entitle it to obtain equitable relief.

Misjoinder of Plaintiffs.

Where the wrong complained of is one in which the State has no direct interest, any more than it has in any ordinary controversy between individuals, the State is not a proper party plaintiff, and the suit should be instituted by the particular individuals who will be injured. (10 Encyc. P. & P. pp. 903, 904, and numerous authorities therein cited in Note 1.)

It is conceded that the parties plaintiff other than the State of Missouri may be joined, where they have a joint interest in the subject-matter of the action. (Ballou *v.* Hopkinton, 4 Gray (Mass.) 324.

In Conclusion.

Counsel for Defendants submit with confidence to this Honorable Court, that the authorities herein cited establish beyond controversy the following propositions:

First: That this Court has not original jurisdiction, in this case, either of the subject-matter or of the parties.

Second: That the facts alleged in the Bill of Complaint

do not show that there is a controversy between the State of Missouri and the State of Illinois and the Sanitary District of Chicago, which entitles the Complainant to invoke the original jurisdiction of this Court.

Third: That upon the face of the Bill of Complaint it appears that the real party in interest, is not the State of Missouri as a State, but certain cities, towns, and individuals in that State.

Fourth: That if the real parties in interest were made parties plaintiff, the jurisdiction of this Court would thereby be ousted.

Fifth: That the Bill of Complaint does not state facts sufficient in law for the State of Missouri to maintain its action against the Defendants, or to entitle Complainant to the equitable relief prayed for therein.

Counsel for Defendants, therefore, insist that their demurrer to the Bill of Complaint should be sustained and that the case should be dismissed.

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WILLIAM M. SPRINGER,
Of Counsel for Defendants.

Office Supreme Court U.S.
FILED
APR 9 1900
JAMES H. McKENNEY,
Clerk

In the

Supreme Court of the United States,

October Term, 1899.

No. 7, Original.

The State of Missouri,

COMPLAINANT,

vs.

The State of Illinois and the Sanitary District of Chicago,

DEFENDANTS.

Brief and Argument of Edward C. Akin, the Attorney-General of the State of Illinois, and of the Attorneys of the Sanitary District of Chicago, in Support of Objections on the Part of said Defendants, to the Granting of a Preliminary or Temporary Injunction in said Cause.

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Attorney-General of the State of Illinois.

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Attorneys for the Sanitary District of Chicago.

WILLIAM M. SPRINGER,
of Counsel for Defendants.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

NUMBER 7, ORIGINAL.

THE STATE OF MISSOURI, COMPLAINANT,

v.

THE STATE OF ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO, DEFENDANTS.

Brief and Argument of Edward C. Akin, the Attorney General of the State of Illinois, and of the Attorneys of the Sanitary District of Chicago, in Support of Objections on the part of said Defendants, to the Granting of a Preliminary or Temporary Injunction in said Cause.

NOTICE OF APPLICATION FOR A PRELIMINARY INJUNCTION.

The Defendants, in the above entitled cause, have been notified that application would be made to this Honorable Court, on Monday, April 2, 1900, for a preliminary or temporary injunction against them, their officers, agents, servants, and employees, to restrain and enjoin them, and each of them, from receiving or permitting any sewage to be received or discharged into the artificial channel or drain described and referred to in the Bill of Complaint,

and constructed by the Defendants, the Sanitary District of Chicago, and from permitting said sewage to flow, or cause the same to be made to flow through said channel or drain towards or into the Des Plaines River, or from doing, causing, or permitting to be done any of the acts or things which are complained of in said Bill of Complaint.

In view of the notice given by Complainant, that a preliminary or temporary injunction would be applied for on the return day of this cause, the Defendants, not waiving their demurrer, filed herein, but wholly relying thereon, have filed separate answers, and caused the same to be verified, in which answers the Defendants specifically deny all the facts and circumstances upon which the equity of the Bill of Complaint is founded, and in which they deny that the fears and apprehensions of injury to Complainant are well founded. Said answers also contain new matter which shows conclusively in the opinion of Defendants that the Complainant is not entitled to any equitable relief whatever.

The Defendants, therefore, earnestly object to the granting of said application for a preliminary or temporary injunction; and in support of their objections thereto, they submit to this Honorable Court, this their brief and argument, in which said objections and the reasons therefor will be specifically stated, and supported by ample authorities.

The Facts.

The Bill of Complaint of the State of Missouri in this case, recites, briefly stated, the following facts as the basis of its right to equitable relief by injunction at the hands of this Honorable Court.

That on the banks and shores of the Mississippi River,

below the mouth of the Illinois River, are many cities and towns in the said State of Missouri, and many thousands of persons who rely on the Mississippi River for their daily necessary supply of water for drinking, and all other purposes; that said waters are indispensable to the life, health and business of many thousands of the inhabitants in the said State of Missouri; that the cities and towns below the mouth of the Illinois River have built and constructed waterworks, which derive their supply of water from said Mississippi River; that the State of Illinois passed a law in 1889, known as the Sanitary District Act, under which the Sanitary District of Chicago, one of the Defendants herein, was organized, and that said corporation has constructed a channel or drain from the Chicago River in the City of Chicago, to a point near Lockport in the County of Will in said State, where said channel connects with and empties into the Des Plaines River, which empties into the Illinois River and which latter River empties into the Mississippi River at a point about forty-three miles above the City of St. Louis in the State of Missouri. That these Defendants now propose and threaten to receive into said channel or drain the sewage matter and filth of the Sanitary District of Chicago, and have in part effectuated this threat and purpose, and threaten to permit and to cause said sewage and filth to flow through the channel or drain toward and into said Des Plaines River, and eventually into the Mississippi River; that if Defendants should be permitted to carry their said threats into execution, and should cause said sewage and other noxious and poisonous matters which would otherwise flow into Lake Michigan, to flow into the Mississippi River, that the waters of the Mississippi River within the jurisdiction of the State of Missouri will of a certainty be poisoned and polluted and rendered

wholly unfit for drinking and other domestic purposes, and will render wholly valueless the various waterworks systems of the cities and towns on the borders of the said State of Missouri, and deprive its inhabitants of the right to the use of the water of the said river, for drinking and other purposes, as said water has been used heretofore; that said threatened action of the Defendants will amount to a direct and continuing nuisance to the State of Missouri and its inhabitants; and that unless restrained by the order of this Court, the Defendants will, in accordance with the terms of the act under which said Sanitary District is organized, upon the permit of the Governor of the said State of Illinois, turn said water and sewage aforesaid into the Des Plaines River, thence into the Mississippi River. The Bill of Complaint closes with prayer for subpœna and for injunction, restraining and enjoining the Defendants from permitting or causing any of said sewage to flow into said channel or drain, and prays also for a provisional or temporary injunction pending this cause, restraining and enjoining the several acts aforesaid. The Bill of Complaint also alleges that before any water or sewage shall be admitted into any channel constructed under the act creating the Sanitary District of Chicago, the trustees thereof shall notify the Governor of the State of Illinois of the completion of said channel, and the Governor shall appoint three commissioners to examine said canal or channel and report to the Governor whether the same complies with the act of the State of Illinois; and if it does the Governor shall authorize the water and sewage to be turned into said channel, and that without said permit it cannot be so turned in. And in the Complainant's prayer for injunction, there is a special prayer that the State of Illinois be enjoined and restrained from issuing to its co-

defendant permission and authority to do and perform the acts aforesaid, or to allow them to be done.

The Bill of Complaint also avers that by the general provisions of said act, said channel is at all times subject to the control and supervision of the State of Illinois and of its authorities.

It will be seen from this brief recital of the allegations contained in the Bill of Complaint, that it does not allege that any nuisance exists, or that any damage has been done by the Defendants to the Complainant, or to any of the cities and towns or inhabitants in the State of Missouri. The allegations of the Bill are to the effect, that the Defendants threaten to do certain things, which if done would produce the injury, annoyance or nuisance of which complaint is made.

THE SEPARATE ANSWER OF THE STATE OF ILLINOIS.

The State of Illinois submits its separate answer by its Attorney General, in which it unites with its co-defendant, in the formal admissions, and denials as to the Bill of Complaint made by the said Sanitary District of Chicago, in its separate answer, and further makes the specific allegation, that prior to the time when the Complainant presented to this Honorable Court its motion for leave to file its Bill of Complaint, herein, the Governor of the State of Illinois had appointed the three commissioners mentioned in Complainant's bill; that they had made their report as required by law; that they had found that the channel had been substantially completed, and that the Governor had issued his permission and authority to the Board of Trustees of the said Sanitary District, to turn into said channel the water and sewage of said Sanitary District of Chicago. And in the separate answer

of the Sanitary District of Chicago, it is alleged that said water and sewage were turned into said channel and into the Des Plaines and Illinois Rivers, in pursuance of the permission and authority given by the Governor of said State of Illinois. The answer of the State of Illinois admits the allegation contained in the Bill of Complaint to the effect that by the general provisions of the act of the State of Illinois, under which the said Sanitary District of Chicago was created, the said channel or canal was at all times to be subject to the control and supervision of the State of Illinois and of its authorities; but the said State of Illinois avers that said control and supervision can only be exerted through and by the law-making power of said State, and that the only authorities of said State, who have any such control and supervision over said channel or canal, are the Board of Trustees of the said Sanitary District of Chicago, their officers, agents and employees.

In view of the fact that the only acts required to be done by the Governor of the State of Illinois in reference to said canal or channel, were done and performed by him prior to the institution of this suit, and in view of the further fact, that the control and supervision of the State of Illinois, other than that imposed by law upon the Sanitary District of Chicago, can only be exercised by the law-making power of said State, which power cannot be controlled by injunction or other process issuing out of this Court, the State of Illinois submits to this Honorable Court whether said Bill of Complaint should not now be dismissed as to it.

THE SEPARATE ANSWER OF THE SANITARY DISTRICT OF CHICAGO.

The separate answer of the Sanitary District of Chicago is quite voluminous, and counsel will not attempt to recite in this brief a complete synopsis of its provisions. The attention of the Court is earnestly requested to its specific denials of all the facts and circumstances set forth in Complainant's Bill, as the grounds for equitable relief and for an injunction in this case. This separate answer specifically denies that the Complainant's fears and apprehensions of injury are well founded.

And said answer admits not alone that the Sanitary District of Chicago has about completed said drainage channel, but states that it has completed the same, and that it has received into said channel the sewage and filth of the said Sanitary District of Chicago, which carries nearly the entire sewage of the said City of Chicago and a portion of that of the County of Cook, and that it has caused said sewage and filth to flow through said channel or drain towards and into the Des Plaines River. But said Defendant denies that said sewage and filth will be carried into said Mississippi River, or that it will pass by the homes of the inhabitants of the said State of Missouri, or of the cities and towns and their waterworks within said State of Missouri. This Defendant, the Sanitary District of Chicago, in its said answer, further denies that it is true, as stated in said Bill of Complaint, that the said City of Chicago has been discharging its sewage matter and filth into the Chicago River, and into Lake Michigan, in such large quantities that much of it has accumulated upon the bed and along the sides of said river, and upon the bed of the said lake, and upon the shores thereof, and it ex-

pressly denies that the plan adopted and put into operation by this Defendant will loosen said filth so alleged to be deposited upon the bed of said lake and upon the sides of said river, and cause it to flow toward and into the said Des Plaines River; but on the contrary, this Defendant says, that for many years a large portion of the sewage matter arising in said drainage district has been turned into the Chicago River, and has been pumped into the Illinois and Michigan Canal heretofore constructed, and has flowed into the Des Plaines River. But Defendant expressly denies that if it shall carry its plan into execution and shall carry all the sewage, filth and noxious matters arising in said Sanitary District into the waters of the Des Plaines River, through the drainage channel, constructed by this Defendant, that the waters of the Mississippi River will of a certainty, or at all, be poisoned or polluted thereby, as alleged in said Bill of Complaint, and it expressly denies that the carrying out of its plans will destroy the flow and adaptability of the waters of the Mississippi River along the territory of Complainant, for domestic or other uses. And this Defendant expressly denies that such use of said channel will render valueless the waterworks systems of the cities and towns located in the State of Complainant, and that it will injure or destroy the business of said cities and towns, or that it will establish or create as to them a direct and continuing nuisance with the result in the said Bill described, or any injurious results, and it expressly denies that any damage will result to the said cities and towns or inhabitants of Complainant by the carrying out of the plans of this Defendant. And this Defendant further denies that said filth and sewage or any part thereof will be deposited in the bed or soil of the Mississippi River, within the jurisdiction of Complainant; and this Defendant denies that the filth and

sewage of the said Sanitary District of Chicago will pollute and poison the waters of the said Mississippi River to such an extent as to render such waters unwholesome, unfit, and unhealthy for drinking and other domestic uses, by the inhabitants in the territory of Complainant, or unfit for watering stock or for manufacturing purposes, or that it will poison or pollute the waters of the said Mississippi River with the germs of diseases of any kind, or that it will cause a continuing nuisance in the Mississippi River, to the detriment of the State of Missouri, or to the injury of the lives and health of the citizens or inhabitants of said State. But on the contrary, this Defendant expressly avers that the turning into the Des Plaines River of the sewage of the Sanitary District of Chicago, together with 300,000 cubic feet per minute, of the pure water of Lake Michigan, which will accompany the same, will greatly improve the quality of the waters of the Illinois and Mississippi Rivers, and also greatly improve the conditions which existed prior to the 17th day of January last, the time when said sewage and water were turned into said Illinois and Des Plaines Rivers.

The separate answer of this Defendant expressly denies that its acts and doings in Complainant's Bill mentioned, have been without legal authority, but on the contrary, it is averred that each and every of its acts have been in strict pursuance of the authority given it by the State of Illinois.

The separate answer of this Defendant recites the history of the construction of the said canal or channel, by means of which the waters of Lake Michigan have been turned into the Des Plaines and Illinois Rivers, and shows that the work of constructing said channel or canal was begun in 1891, and that all of the acts of said corporation have been open and notorious, and during the

whole of the nine years since the institution of the work upon this great enterprise, this Defendant, the Sanitary District of Chicago, has expended upon said work, more than thirty-three million dollars, and the said State of Missouri had notice of the premises, and of the great work and of the great expenditures, which this Defendant alleges were the expenditure of public monies raised by taxation and by the sale of bonds; and having such notice, as aforesaid, and not having heretofore instituted any proceedings in the courts of the country, it has been guilty of laches and has slept upon its rights, if any it ever had, and is now estopped to urge its cause.

This Defendant, the Sanitary District of Chicago, in its separate answer, filed herein, alleges that the distance by way of the drainage channel, from Robey street, Chicago, to the mouth of the Illinois River is 322 miles; that this River and its tributaries embrace an area of twenty-five thousand square miles, and that it furnishes the natural drainage system for a country thickly populated, occupied by not less than a million and a half of people, outside of the Sanitary District of Chicago, and that the various sewage of this great population of these great cities, is received into the Illinois River, above its junction with the Mississippi River; and that in addition thereto, as stated in its separate answer, the sewage of the Sanitary District of Chicago has been discharged into said Des Plaines and Illinois Rivers for the last thirty years, and from thence into the Mississippi River.

The separate answer of this Defendant further states that in addition to the sewage and drainage carried into the Illinois River and from thence into the Mississippi River, is the sewage and drainage of a vast territory tributary to the Mississippi and Missouri Rivers; that this territory so drained, is substantially all of the land of

the United States between its northern border and a central line running east and west through the State of Kansas, prolonged eastward through the State of Missouri, and from the Rocky Mountains on the west to a line running from northeast to southwest, through the State of Illinois from the City of Chicago to the City of St. Louis, and that in addition thereto the western half of the State of Wisconsin and the western two-thirds of the State of Minnesota. That the population of this region so drained into the Mississippi River is in the neighborhood of fifteen million people. That an uncounted number of cities and towns with populations ranging from two thousand to two hundred and fifty thousand, are situated upon the banks of said Mississippi and Missouri Rivers and their tributaries, and discharge their sewage therein. The answer mentions among these cities, Minneapolis and St. Paul, Omaha, Des Moines, Dubuque, Keokuk, Quincy, Kansas City, and many others, which are named in said answer, and attached to said answer are exhibits, giving the names and location of these cities and towns with their populations, according to the census of 1890. In the answer of this Defendant it is shown that the said Mississippi River and the said Missouri River and their tributaries above the cities and towns in the State of Complainant mentioned in said I[illegible] constitute the natural and uncontrollable drainag[illegible] this whole region, this whole vast population, and this whole system of industries, and that said cities and towns use the said system for their sewage, from their location downward. The answer of this Defendant shows that the additional amount of sewage which will be discharged by the channel or canal, constructed by the Sanitary District of Chicago, is but trifling in amount as compared to the enormous volume of sewage received into said Mississippi River, above the

City of St. Louis and the other cities and towns in State of Complainant, mentioned in said Bill.

The said separate answer of this Defendant calls attention to the fact that by the natural law relating to sewage and drainage, and running water in large bodies, the said sewage, instead of contributing harmful elements, is relieved of all its deleterious qualities by processes of vaporization, attrition, lodgment, absorption, chemical conversion and bacteriologic changes, so that in the end the water purifies itself.

And further the said separate answer of this Defendant alleges that in pursuance of the act incorporating it, it is removing from its sewage all of the solid material and is diluting all the liquid by the addition thereto of twenty cubic feet of water drawn from Lake Michigan, to every cubic foot of sewage. Wherefore, said Defendant by its separate answer avers that it will not, in and by the operation of its system, contaminate, pollute or destroy the water supply, from the said Mississippi River and its tributaries, of the inhabitants, cities and towns in the State of Complainant, as alleged in and by said Bill declared.

The attention of the Court in this case is especially called to the fact, that both the separate answers of the State of Illinois and of the Sanitary District of Chicago, have been verified by the oaths of the Governor of the State of Illinois and of a member of the Board of Trustees of the Sanitary District of Chicago. Notwithstanding the fact that the Bill of Complaint expressly waives an answer under oath, yet Defendants have verified their answers in order that they may be regarded by the Court, on the application for temporary injunction, as affidavits, thus complying with the amendment to the forty-first equity rule of this Court.

Having briefly recited the material allegations in the Bill of Complaint, and the answers filed herein, the Defendants submit their Objections to the granting of a preliminary or temporary injunction in this cause, and the authorities in support thereof.

OBJECTIONS.

First. It appears upon the face of the Bill of Complaint that this Court has not original jurisdiction of this cause.

In support of this objection, the Defendants call attention of this Court to their demurrer filed herein and to their brief and argument in support thereof.

If a preliminary injunction should be granted by this Honorable Court, and it should hereafter appear by your judgment on Defendants' demurrer that this Court had no jurisdiction, either of the parties or of the subject-matter of this cause, any order of the Court theretofore issued would be a nullity, and the officers of this Court executing such orders would not be protected thereby. Hence we contend, when the question of jurisdiction is raised upon the face of the pleadings, that that question takes priority of consideration over all others, including priority over the consideration of the motion or application for a preliminary injunction.

Second. It appears upon the face of the Bill of Complaint, filed herein, that the Complainant is not entitled to an injunction, either temporary or permanent, against Defendants in this cause.

It is recited in the Bill of Complaint that if Defendants turn into the Des Plaines River the filth and sewage of the City of Chicago, that it will flow into the Mississippi River

within the jurisdiction of Complainant, and that the waters of the said Mississippi River "will of a certainty be poisoned and pollated, and rendered wholly unfit and unhealthy for domestic uses, and will render wholly valueless and entirely worthless the various waterworks systems of the towns and cities on the borders of the State of Missouri, and deprive its inhabitants of the right to the use of said river for drinking and all other domestic, manufacturing and agricultural purposes." From this recital it appears that the injury threatened is to the cities and towns on the borders of the State of Missouri and their waterworks systems, and to the inhabitants on the banks of said Mississippi River, who use said waters for drinking and other domestic, manufacturing and agricultural purposes. It is true that the Bill of Complaint states that the State of Missouri will be deprived of its right to the waters of said river for drinking and other purposes stated. But no fact is alleged which shows that the State of Missouri as a State uses water for drinking or other domestic, manufacturing or agricultural purposes. The allegation is imperfect and insufficient to show that any injury will result to the State of Missouri as a State. The State does not drink water, the State does not carry on manufacturing or agricultural enterprises, nor does it use the water of the Mississippi River for any domestic purpose. This suit is therefore begun for no other purpose than the protection of the cities, towns and private individuals along the banks of the Mississippi River, in the territory of Complainant.

In the consolidated cases of the State of New Hampshire against the State of Louisiana and others, and the State of New York against the State of Louisiana and others, which were original suits brought in this Court (108 U. S., 76), it was held "that Article 9 of the Amend-

ments to the Constitution of the United States, prohibits the Supreme Court from entertaining jurisdiction of a cause in which one State seeks relief against another State on behalf of its citizens, in a matter in which the State prosecuting has no interest of its own, unless the State prosecuted consents thereto." And further, "that one State cannot create a controversy with another State, within that term as used in the judicial clause of the Constitution." In these consolidated cases, it appeared that the States of New Hampshire and New York had each passed an act by their respective legislatures, to the effect that any citizen of the State holding a written obligation of another State to pay money which was past due and unpaid, might assign the claim to the State, and upon such assignment being made, the Attorney General was authorized to institute an original suit in the name of the State against the State which issued the written obligation, for the recovery of the money due upon the claim. In that case this Court by Mr. Chief Justice Waite, stated, as follows: "This State (N. Y.) as well as New Hampshire is nothing more nor less than a mere collecting agent of the owners of the bonds and coupons, and while the suits are in the names of the State, they are under the actual control of individual citizens and are prosecuted and carried on by and for them." The bill in each of those cases was dismissed. And in the case at bar, it may be said with equal force, the State of Missouri although the suit is in its name is acting merely as the agent of cities and towns and private individuals, to whom other Courts than this as a court of original jurisdiction are open for the redress of whatever grievances they may have.

As was stated in the opinion of this Court by his honor Mr. Chief Justice Fuller, in the case of the State of

Louisiana *v.* The State of Texas *et al.*, handed down January 15, at this term of Court, referring to the bill in that case: "It is in this aspect that the bill before us is framed. Its gravamen is not a special and peculiar injury, such as would sustain an action by a private person, but the State of Louisiana presents herself in the attitude of *parens patriæ*, trustee, guardian, or representative of all her citizens." It is precisely in this attitude that the State of Missouri presents itself in the case at bar. In that case the demurrer was sustained and the bill dismissed.

See also the recent case *In Re* Hartung, 98 Wisc. 140; 73 N. W. 988.

See also the case of State *v.* Patterson *et al.* (Court of Civil Appeals of Texas, October, 1896), wherein it was held: "Where the State, through its proper officer, seeks the jurisdiction of a Court of equity to abate, by injunction, a public nuisance, it must show that such nuisance is an injury to the property or civil rights of the public at large, which it is his duty, as the agent of the public, to present." (37 S. W. Rep'r, 478.)

Third. Defendants object to the granting of a temporary injunction in this case upon the ground that the Complainant's right thereto has not been previously established in a proper tribunal and is in doubt; and upon the further ground that the Defendants dispute the right of the Complainant and deny that any injury whatever will result to Complainant or to any of the cities and towns or inhabitants in the State of Missouri by reason of the acts complained of in the Bill of Complaint.

In England from a very early day the rule has obtained that a court of equity will not entertain jurisdiction of a suit to enjoin a nuisance, waste, trespass, or violation of

franchises, or like injuries, where the complainant's right has not been previously established in the proper tribunal, or is in doubt, and the defendant disputes the right of the complainant, or denies the fact of its violation; and that under such circumstances the court will ordinarily do nothing more than preserve the property in its present condition, if that be necessary, until the question of right can be established at law. In support of this doctrine the Encyclopedia of Pleading and Practice, Vol. 10, p. 887, cites the leading English cases on this subject; and also the leading text-books of this country; and numerous decisions in the States of Alabama, Connecticut, Delaware, Florida, Illinois, Maine, Maryland, Massachusetts, Mississippi, Missouri, New Hampshire, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Tennessee, Utah, Vermont, Virginia, and the following cases in the United States courts: Irwin *v.* Dixion, 9 How. (U. S.) p. 10; Fitzpatrick *v.* Childs, 2 Brews. (Pa.), 365; Potter *v.* Whitney, 1 Lowell (U. S.) 87; Zinsser *v.* Cooledge, 17 Fed. Rep., 538.

In the case of Rouse *v.* Martin, 75 Ala., 510, the Supreme Court of Alabama held that, "where the thing sought to be prohibited is not unavoidably noxious in itself, the court will generally refuse to interfere until the matter has been tried at law;" citing Rosser *v.* Randolph, 7 Port. (Ala.) 238.

In the case of Thebaut *v.* Canova, 11 Fla., 143, it was declared that the court will be slow to interfere in case of doubtful right.

In the case of Dunning *v.* Aurora, 40 Ill., 481, Walker, Chief Justice of the Supreme Court of the State of Illinois, said: "A court of equity will, under some circumstances, grant an injunction to restrain the erection of a nuisance, but with great caution. This is always so where

there is a remedy at law, until the right has been established by a verdict. And a court will always act with reluctance in abating a nuisance, and seldom, if ever, until it has been regularly found to be such by a jury."

In the Citizens Coach Co. *v.* Camden Horse R.R. Co., 29 N. J., Eq., 299, the court declared: "No rule of equity is better settled than the doctrine that a complainant is not in a position to ask for a preliminary injunction when the right on which he founds his claims is, as matter of law, unsettled," citing numerous adjudicated cases in the State of New Jersey.

In the case of Rochester *v.* Curtiss, 1 Clarke Ch. Reps. (N. Y.) 336, Vice Chancellor Whittlesey, said:

"In cases of doubtful right, or remote and contingent injury, this Court will wait for the right to be settled at law, or the injury to become imminent before it will interfere with its extraordinary process of injunction."

In the case of Sanderlin *v.* Baxter, 76 Va., 299, the Supreme Court of Virginia held that ordinarily where the existence of a nuisance is controverted, complainant will be required first to establish his right at law.

In the case of Burnham *v.* Kempton, 44 N. H., 79, the Supreme Court of New Hampshire held:

"Ordinarily, courts of equity will exercise a concurrent jurisdiction with courts of law in cases of private nuisances only when they can restrain irreparable mischief, suppress interminable litigation or prevent a multiplicity of suits; and in such cases, courts of equity will not ordinarily take upon themselves to decide the fact that a nuisance exists, when that fact is controverted, but will require that the party asking the interference of the Court, shall first establish his right at law."

In the case of Eastman *et ux v.* Amoskeag Manufac-

turing Co., 47 N. H., 71, the Supreme Court of New Hampshire, all the judges concurring, held:

"A court of equity will not undertake to decide whether a nuisance exists, until the plaintiff shall fully establish his rights at law. * * * To justify the interference of a court of equity in their issue of a writ of injunction, the plaintiff must show by other proof, a case of strong and clear injustice, of pressing necessity, imminent danger, of great and irreparable damage, and not of that nature, for which an action at law, would furnish an adequate remedy."

Counsel for Defendants concede that if the facts alleged in a complaint show clearly that irreparable injury may be wrought and the allegations of the answer do not satisfactorily controvert such facts, a Court having jurisdiction will take cognizance, and if the circumstances require it direct a trial by jury, in the meantime restraining Defendant by injunction. But such a course is pursued only where the facts are not denied and where it clearly appears from the pleadings that irreparable injury will result, if the temporary injunction is refused.

Fourth. The Defendants object to the granting of a preliminary injunction in this case for the reason that in their answers, filed herein, they deny under oath all the equities of the Bill of Complaint.

The general rule upon this subject is that, where the answer under oath denies the equities of the bill, a preliminary or temporary injunction will be refused. (See Vol. 10, Enc. of Pleading and Practice, p. 1000, and numerous cases cited in Note 2, in support of this doctrine.) The authorities cited embrace cases in the States of California, Florida, Georgia, Iowa, Kansas, Maryland, Nevada, New Jersey, New York, Oregon, Pennsylvania, and numerous others in the United States Courts.

In California, in the case of Gagliardo *v.* Crippen, 22 Cal., 362, the Supreme Court of that State held, "that the application should be denied where the allegations of the complainant are fully and specifically controverted by the defendant's affidavit."

In Georgia, the Supreme Court held, "where the equity of the bill is sworn off by the answer, and the denials of the answer are not overcome by proof, injunction should be refused." Citing Flash *v.* Long, 67 Ga., 767; Spence *v.* Steadman, 49 Ga. 133; Kenan *v.* Johnson, 48 Ga. 28.

In New York, in the Supreme Court, in the case of Decker *v.* Decker, 52 How. Pr. 218, it was said: "It is an elementary principle that where the whole equity of the complaint is denied, an injunction will not be granted," citing American Grocers Pub. Asso. *v.* Grocers Pub. Co., 51 How. Pr. (N. Y. S. Ct.) 402; Finegan *v.* Lee, 18 How. Pr. (N. Y. S. Ct.) 187; and numerous other cases in that State.

In the case of Perkins *v.* Warren, 6 How. Pr. (N. Y. S. Ct.) 341, it was held:

"An application under the code, for an injunction *pendente lite*, should be denied, where the defendant denies under oath the facts upon which the plaintiff relies in his affidavit."

In the case of Clum *v.* Brewer, 2 Curt. (U. S.) 506, the Circuit Court of the United States held, "that the mere denial of the equity of the bill does not prevent the court from looking into the law and the facts of the case, where special injunction is moved for, and granting or refusing it according to its discretion;" citing Poor *v.* Carleton, 3 Sumn. (U. S.) 70. But in the case of Shoemaker *v.* National Mechanics Bank, 2 Abb. (U. S.) 416 it was held: "As a general rule, however, where the answer denies all

the circumstances upon which the equity of the bill is founded, the court will refuse a preliminary injunction." Citing Leo. *v.* U. P. R. R. Co., 17 Fed. Rep. 273; Flint *v.* Russell, 5 Dill. (U. S.) 151; Batten *v.* Silliman, 3 Wall. Jr. (C. C), 124; Goodyear *v.* Day, 2 Wall. Jr. (C. C.) 283.

In the case of Rogers *v.* Danforth, 9 N. J., Eq. 289, the Supreme Court of New Jersey held, "Where the answer denies that the plaintiff's apprehensions of injury are well founded, the court will, as a general rule, give to the defendant the full benefit of such denial and refuse an injunction."

Fifth. Defendants further object to the granting of a preliminary or temporary injunction in this case, for the reason that there is no allegation that any nuisance actually exists; and that the allegation of apprehension of a nuisance is not well founded.

In the case of Stillwell *v.* Buffalo Riding Academy, 21 Abbott's New Cases, the New York Supreme Court for the 8th District held: "That the doctrine that an injunction may issue to prevent an apprehended nuisance prior to its actual disturbing existence, is applicable only where it is apprehended that the proposed use of the property will actually result in a nuisance." In that case the court reviewed the cases in which injunctions had been granted, and stated that in this latter class of cases, where injunction had been granted, the court assumed, as a necessary result of maintaining the establishments, that they would be nuisances, in such cases an injunction may be issued and maintained to restrain that use of the property, prior to the commencement of its use, citing McKeon *v.* See, 51 N. Y., 300; Adams *v.* Popham, 76 Id., 410. The Court concluded its review of this class of cases as follows:

"But this rule has never been carried so far as to restrain the future use of a building for the purposes of a stable, even where a large number of horses may be intended to be kept and maintained, without some well grounded evidence that it will turn out to be a nuisance and disturbance to the occupants of neighboring property.

"This was examined upon an appeal in chancery in the case of Luscombe *v.* Steer, 17 Law Times (N. S.) 229, where it was held as to the business of brickmaking and brick-burning, which could not under the circumstances be determined necessarily to result in a nuisance, that an injunction could not be issued or maintained prior to such use of the property as would in and of itself constitute a nuisance. Nothing has yet transpired in any way producing disturbance or annoyance to the occupants of the plaintiff's property. And from the affidavits which have been produced on behalf of the defendant it is probable that the building may be used, as it is designed it shall be, by the Defendant, without producing annoyance or disturbance to any of these occupants. And as long as that probability exists, and in the absence of any annoyance or disturbance having yet taken place, the case upon this branch of it is not one for an injunction. If an injunction is to be issued and maintained, that can only be done as to an occupancy of the description proposed by the Defendant, when it shall be found and be capable of being proved as a matter of fact, that such use has become a nuisance, or source of discomfort and disturbance to the occupants of this or other property."

As in that case so with the case at bar, nothing has yet transpired in any way producing nuisances to the cities and towns or inhabitants of the State of Missouri, or injury to their property, and from the allegations in the answers of Defendants, it is probable that the uses to which the proposed canal will be put, will not produce any nuisance or injury to the inhabitants or cities and towns in State of Complainant. And as long as that probability exists and in the absence of any nuisance or

annoyance having taken place, the case at bar is not one for injunction.

In the case of Cleveland *v.* The Citizens Gaslight Co., 20 N. J. Eq. Reps. 201, a preliminary injunction was applied for, pending the litigation. The court stated that a preliminary injunction was not absolutely necessary; that the cause could be brought to a hearing before the works would be completed or in operation; and full proof can be given on both sides, of the effect of such works. The court stated that if on final hearing the facts should be established as contended by Complainant, an injunction would be granted, but the preliminary injunction was refused in view of the conflicting testimony. A portion only of the prayer for relief was granted.

In the case of Butler *v.* Rogers, 9 Stockton's Ch. Rps. (N. J.), 487, it was held:

"As a general rule a court ought not to interfere in case of nuisance, where the injury apprehended is of a character to justify conflicting opinions whether the injury in fact will ever be realized."

In the case at bar as in that case, opinions are conflicting. The Complainant alleges that injury will result. The answers which are entitled to equal force, allege that no injury whatever will result to Complainant in this case.

In the case of Hahn *v.* Thornberry, 7 Bush. (Ky.) 403, it was held that the Chancellor will not interfere by injunction when the nuisance sought to be restrained is eventual or contingent, nor when the evidence is conflicting and the injury to the public, or individual complaining, doubtful.

In the case of Green *v.* Lake, 54 Miss. 540, the Supreme Court of Mississippi, held:

"To restrain by injunction the use of property by the owner, on the allegation that such use will be an annoyance and injury to the property of another, is a very delicate branch of chancery jurisdiction * * *. Generally a court of equity will refuse until the complainant has established at law the existence of the nuisance, and will not act if his right is controverted or not clear * * *. To obtain relief in equity for a private nuisance, the threatened injury must be irreparable, incapable of compensation in damages, and not doubtful or contingent."

In the case of Ross *v.* Butler, 19 N. J. Eq. Reps., 294, it was held that equity will not interfere against a nuisance that is only contingent.

In the case of Pfingst *et al. v.* Senn, 94 Ky. Reps. 556, the Court of Appeals of Kentucky, held that "injunction against a threatened nuisance will not be granted when the thing complained of is not *per se*, a nuisance, but may or may not become so, according to circumstances, or when it is uncertain, indefinite or contingent or productive of only possible injury." In that case the court cited numerous authorities in support of the doctrine announced, concluding as follows:

"Injunctions against threatened nuisances will seldom be granted except in extreme cases where the threatened use of property is clearly shown to be such as leaves no doubt of its injurious results."

The Court of Appeals of Kentucky in that case quoted with approval the language of Lord Brougham in the case of the Earl of Ripon *v.* Hobart, 1 Cooper Cases Ch. 33, as follows:

"If the thing sought to be prohibited is in itself a nuisance, the court will interpose to stop the irreparable mischief without waiting for the result of a trial. But

when the thing sought to be restrained is not inevitably in itself a nuisance, but only something which may, according to circumstances, prove so, then the court will refuse to interfere * * *. It is also very material to observe that no instance can be produced of the interposition by injunction, in the case of what we have been regarding as an eventual or contingent nuisance."

See also High on Injunctions, Sec. 743.

In the case of Bowen *v.* Manzy, 117 Ind. Reps., the Supreme Court of Indiana, held:

"In order that a person may be restrained by injunction from commencing the operation of a business, when it is legitimate, it must appear that the defendant threatens and intends to conduct the business in a manner which will constitute a nuisance."

And further that court held in that case:

"If such facts are not shown as to make it appear affirmatively that he intends to conduct the business in a manner so that it will constitute a nuisance, it will be presumed that he will conduct the business properly and so that it will not interfere with the rights of others. The courts of equity will not interfere by injunction, under the rule of law we have cited."

In the case of Ellison *v.* Connor, 5 N. C. Reports, p. 57, the Supreme Court of North Carolina, held:

"It is settled in respect to private nuisances, that where a nuisance apprehended is dubious or contingent, equity will not interfere, but will leave the complainant to his remedy at law. See Drury on Injunction, 242; Barnes *v.* Calhoun, 2 Ire. Eq. 199; The Attorney General *v.* Lea, 3 Ire. Eq. 205, and Simpson *v.* Justice, 8 Ire. Eq. 115."

In the case of Flint *v.* Russell, (5 Dill. C. C. Reps. 151), Dillon, Circuit Judge, held as follows:

"Where the facts stated in the complaint, showing that the erection and the use of a livery stable would be a nuisance, to the adjoining property, were denied by the answer, preliminary injunction to restrain the erection of a building to be used as a livery stable would be refused."

The learned Judge in that case quoted with approval the doctrine laid down by Lord Chancellor Brougham, in the case of the Earl of Ripon *v.* Hobart, *supra*, and stated further:

"No case has been referred to in which the erection of a livery stable has been enjoined, where the fact that it would be a nuisance was denied; and where it had not been ascertained to be such by a proper judicial inquiry before the injunction was awarded. And so far as my researches have gone, Lord Brougham is entirely correct in his statement in the Earl of Ripon case, *supra*, that no instance can be produced of the interposition by injunction in the case of an eventual or contingent nuisance. (Cleveland *v.* Citizens Gas Co., 20 N. J. Eq. 201; Duncan *v.* Hayes, 22 *ib.* 25; Rhodes *v.* Dunbar, 57 Pa. St. 274; Wood on Nuisances, Sec. 789.)"

In the case of McLaughlin *et al. v* The President and Trustees of Lamasco City, 6 Ind., decided by the Supreme Court of the State of Indiana in 1855, the Court held:

"In such cases of conflicting evidence and the injury to the public doubtful, if not imaginary, an injunction should not be granted. (2 Story Eq. 271, Note 1, title, 'Injunction.') So when the alleged nuisance is merely eventual or contingent, courts will not grant an injunction."

In the case of Spooner *v.* McConnell *et al.*, 1 McLean, (U. S.), 337, it was held by McLean, Circuit Judge:

"That courts of chancery will not interfere by injunction to prevent threatened wrong, unless the danger is

imminent and the injury irremediable in any other form." * * * And further, "chancery does not deal with abstractions or contingencies, but with practicable rights, and to prevent impending wrongs. The complainant alleges generally, that he will be injured in his property by the construction of the dam, and on these grounds prays an injunction; but he does not show how he will be injured. This is necessary that the court may judge whether the wrong complained of entitles him to an injunction. Every wrong done in this way on which an action may be sustained will not entitle the party to an injunction. The facts must present a case which cannot be adequately redressed in any other form."

In that case Judge McLean further stated as follows:

"If the injury which the complainant presents should result from the operation of this public improvement, he may have a remedy in another form. He may be enabled either by an appeal to the legislature of the State, or by an action at law, to obtain a redress of the grievances complained of; but in the form and under the circumstances in which the case is before this Court, he is not entitled to the process of injunction."

The reasoning of the learned Judge in that case applies with equal force to the case at bar.

Sixth. Defendants further object to the granting of a preliminary or temporary injunction in this case for the reason that the apprehended pollution of the waters of the Mississippi River may never happen, and the apprehension of injury is a mere matter of opinion.

In the case of Thebaut *v.* Canova, 11 Fla. 143, the Supreme Court of Florida held:

"Where a bill for an injunction alleged that a steam-mill, if put into operation, would unavoidably and in itself become a nuisance, this allegation was held to be

nothing but an expression of opinion by the plaintiff upon which the court should not retain the injunction, but should leave the parties to their remedy at law."

In the case of the City of Hutchinson *et al. v.* Delano, 46 Kas. p. 345, the Supreme Court of that State, all of the Justices concurring, in the opinion by Chief Justice Horton, held:

"The apprehended fouling or pollution of a stream of water in the future, by the sewage of a part of a city from sewers, which have been legally, scientifically and properly constructed, but which has not yet taken place, and of which there is no immediate or imminent danger, and which depends upon a contingency that may or may not happen, does not present a case for an injunction;" citing the following cases: (Aqueduct Board *v.* Passaic, N. J. 1890, 20 Atl. Rep. 54; Coach Co *v.* Horse Car Co., 29 N. J. Ex. 299; Stitt *v.* Hilton, 31 N. J. Eq. 285; Del. Lack & West. R. R. Co. *v.* Stock Yards Co., *ib.* 605; Hagerty *v.* Lee, 45 *ib.* 255; Stoudinger *v.* City of Newark, 28 *ib.* 187; Merrifield *v.* Worcester, 110 Mass. 216; Brookline *v.* Mackintosh, 133 *ib.* 215; Morgan *v.* City of Binghamton, 102 N. Y. 500; Dunn *v.* City of Austin, Texas, 1889, 11 S. W. Rep'r 1125; High Injs., Sec. 742; Wood Nuis., Sec. 796–797.) See also 33 American and English Corporation Cases, p. 87.

In the case of Newark Aqu. Board *v.* The City of Passaic *et al.* cited *supra*, the syllabus is as follows:

"Upon bill filed to restrain the construction of public sewers, by the operation of which it was alleged, the water supplied by the complainant to the inhabitants of Newark would be injuriously polluted, when defendants' answer and accompanying affidavits rendered it doubtful whether the apprehended nuisance would arise.—Held, that the preliminary injunction was thereupon properly refused." Citing Citizens' Coach Co. *v.* Camden Horse

R. R. Co., 2 Stew. Eq. 299; Stitt *v.* Hilton, 4 Stew. Eq. 285; Del. Lack. & West. R. R. Co. *v.* Central Stock Yards & Transit Co., 16 Stew. Eq. 605; Hagerty *v.* Lee, 18 Stew. Eq. 255. In this case eight judges concurred, including Chief Justice Dixon, and two judges dissented.

In the case of Morgan *v.* Binghamton, 102 N. Y., the Court of Appeals of the State of New York, in an opinion by Finch, Justice, in which all of the judges concurred, it was held as follows:

"A court of equity will not interfere by injunction with the plan of improvements adopted in good faith by municipal authorities, and within the scope of their authority, where the injury therefrom is doubtful, eventual, or contingent. To justify such an interference, it must be shown that injury, material and actual, is a necessary or probable result."

In the case of Hagerty *v.* Lee, *et al.*, 45 N. J. Eq. p. 255, the Court of Errors and Appeals of New Jersey, all the judges concurring, held:

"It is impossible to emphasize too strongly the rule so often enforced in this court, that a preliminary injunction will not be allowed where either the complainant's right, which he seeks to have protected, *in limine*, by the interlocutory injunction, is in doubt, or where the injury which may result from the invasion of that right is not irreparable;" citing Morris and Essex R. R. Co. *v.* Prudeu, 5 C. C. Gr. 530–541; Citizens Coach Co. *v.* Camden Horse Car R. R. Co., 2 Stew. Eq. 299; Del. Lack. & West. R. R. Co. *v.* Central Stock Yards Co., 16 Stew. Eq. 605. One of the latest decisions in the English courts to the same effect is, The Mogul Steamship Co., *v.* McGregor, Gow & Co. L. R. (15 Q. B. Div.) 476.

In the case of Hensley *v.* Bew, 53 N. J. Eq., p. 242, Court of Errors and Appeals of New Jersey, all of the judges concurring, Held:

"In equity procedure, it is always settled that an injunction to restrain a nuisance will issue only in cases where the fact of nuisance is made out upon determinate and satisfactory evidence. If the evidence be conflicting and the injury be doubtful, that conflict and doubt, will be a ground for withholding injunction. And where interposition by injunction is sought, to restrain that which is apprehended will create a nuisance of which the complainant may complain, the proofs must show upon such a state of facts as will manifest the danger to be real and immediate." Newark Aqe. Board *v.* Passaic, 18 Stew. Eq., 393–402.

This is a recent case decided in 1895 and fully sustains current of opinions upon this subject, not only in New Jersey, but in all the States of the Union.

It is unnecessary to multiply quotations from authorities on this subject. The rule laid down in New Jersey is the same in all the State courts and in all United States courts, as well as in the text-books.

The following adjudicated cases are cited:

McHugh *v.* Boston, H. & E. R. R. Co. *et al.*, 66 Burber's Supreme Court Reps. p. 612.

Henry B. Turner *v.* The People's Ferry Co., 22 Blatchford's C. C. Reps. p. 272.

Ormerod *v.* N. Y. W. S. & B. R. R. Co., 21 *ib.* 106.

Jones *et al. v.* Hodges, 1 Holmes (U. S.), p. 37.

Home Ins. Co. *v.* Nobles *et al.*, 63 Fed. Rep'r, p. 642, (C. C. E. D. Pa.) Sept., 1894.

Farley *v.* Gate City Gas Light, 31 S. E. 193; 195 Ga. 323.

Columbia Ave. Saving Fund S. D. T. & T. Co. *v.* Prison Commission (C. C. W. D. Ga.) 52 Fed. Rep'r, 108.

Seventh. Defendants further object to the granting of a preliminary or temporary injunction in this case for the

reason that the Complainant has been guilty of *laches*—of unreasonable and inexcusable delay in asserting its right, if any it ever had, to enjoin an apprehended danger.

LACHES.

The Sanitary District of Chicago, in its separate answer filed herein, calls attention to the fact that the legislature of the State of Illinois, on the 29th day of May, 1889, passed an act under which the Sanitary District of Chicago was created. That this Sanitary District duly officered has been in existence since January, 1890. At that time this Defendant entered upon the duties imposed by said act. That the right of way was secured, and wherever necessary, condemnation proceedings were had, and that all of its acts have been open and notorious, whereof all people and courts are required to take notice. That there are a number of lines of railway passing between the City of Chicago and the City of St. Louis, one of the cities in the State of Complainant, near to and in plain sight of the work in progress from time to time, on said canal. That the work performed by this Defendant was a matter of notoriety to all persons travelling said roads, and that such has been the magnitude of said work, and the difficulties overcome, that it became the subject of innumerable publications, and that the Sanitary District of Chicago has expended upon said work more than thirty-three millions of dollars, openly and of record. That prior to the filing of the complaint herein, the work was practically completed and that on the 17th day of January, 1900, at 11.16 A. M., which was prior to the time when Complainant presented its motion for leave to file its Bill of Complaint herein, and five days prior to the time that said bill was filed by leave of this Court, the waters of

Lake Michigan were turned into the Des Plaines River; and that the amount of water discharged since that time into said river has been equal to 300,000 cubic feet per minute. Wherefore, by reason of these facts, Defendants contend that the Complainant had notice of the premises and of the great work and of the great expenditures of public money, and having such notice, and having so waited as aforesaid, Complainant has been guilty of *laches*, and has slept upon its rights, if any it ever had, and is now estopped to urge its cause.

Laches is defined to be unreasonable delay; or the neglect to do at the proper time, what by law or duty ought to be done; or the failure to prosecute a claim within a proper and reasonable period. Another definition of *laches* is, "inexcusable delay in asserting a right." 12 Encye. P. & P., p. 829. 2 Bouv. L. Dic. Tit. Laches.

The Complainant has been guilty of unreasonable delay in asserting its right to enjoin an apprehended danger. If the Complainant relied upon this ground to enjoin the construction of this work, it could have made its case just as strong ten years ago, as at the time of the commencement of this suit, and it could then have been adjudged by this Court or by any court having jurisdiction, whether the threatened injury to Complainant was such as to entitle it to an injunction to prevent the construction of the work. If Complainant had presented this cause within a reasonable time, the vast expenditure of money which has been made by the said Sanitary District, would have been saved. Hence, we hold that the delay of Complainant in asserting its right to enjoin the completion of this work, if it ever had such right, upon the ground of apprehended danger, is inexcusable; that its delay is unreasonable, and that it has neglected to do at the proper time, what by equity and good conscience, it

should have done. It is unreasonable that Complainant should stand by and see Defendants expend many millions of dollars upon the construction of a great public work, if it believed such work would be an injury to it, without asserting any objection thereto, until after the work had been completed, and many millions of dollars expended thereon. Such delay is inexcusable; and by thus failing to assert its objections, within a proper and reasonable period, it is guilty of *laches*. It is too late now for the Complainant, which has not done equity, to demand equitable relief. "He who seeks equity, must do equity," and, "Equity aids the vigilant, not the slothful," are maxims of equity of universal application.

In the case of Smith *v.* Clay, Ambl. 645, quoted in Delorane *v.* Brown, 3 Bro. C. C. 640, Note, Lord Camden said of the English equity court:

"Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence; where these are wanting the court is passive and does nothing. *Laches* and neglect are always discountenanced, and therefore from the beginning of this jurisdiction there was always a limitation to suits in this court. It is and always has been the practice of courts of equity to remain inactive where a party seeking their interference has been guilty of unreasonable *laches* in making his application. Calhoun *v.* Millard, 121 N. Y. 81."

Equity can only help the diligent. The principle laid down by Lord Camden more than a century ago is still the guide of the court in cases where the party seeking its aid has been guilty of great delay. Norfolk, etc., Hosiery Co. *v.* Arnold, 49 N. J. Eq. 397.

A frequent application of the maxim is in bills for injunction; and it is well settled that even when the applicant had originally ample grounds for equitable relief,

this may be denied him if he delays unduly. (See 11 Encyc. of Law, 2d Ed. p. 166, and numerous American and English authorities cided in Note 1.) The citations are as follows:

Laches a Bar to Injunction—England.—Cooper *v.* Hubbuck, 30 Beav. 160; Graham *v.* Birkenhead, etc., R. Co., 2 Macn. and G. 146; Lord *v.* Sutcliffe, 2 Sim. 273; Senior *v.* Pawson, L. R. 3 Eq. 330.

Massachusetts.—Fuller *v.* Melrose, 1 Allen (Mass.) 166; Tash *v.* Adams, 10 Cush. (Mass.) 252.

Nebraska.—North *v.* Platte County, 29 Neb. 447.

New Jersey.—East Newark Co. *v.* Gilbert, 12 N. J. Eq. 78.

Pennsylvania.—Grey *v.* Ohio, etc., R. Co., 1 Grant's Cas. (Pa.) 412.

In North *v.* Platte County, 29 Neb. 447, the court in denying a taxpayer's application to enjoin the payment of county bonds, observed:

"The action was brought nine years after the bonds were issued and delivered, and the plaintiff shows by his petition that he has been a taxpayer of Platte County during many years past. There are many cases holding that such delay and laches will defeat an action where relief would have been granted had the application been seasonably made. Marshall County *v.* Schenck, 5 Wall. (U. S.) 772; Clay County *v.* Savings Soc., 104 U. S. 579; Johnson *v.* Stark County, 24 Ill. 75, Keithsburg *v.* Frick, 34 Ill. 421; Com. *v.* Pittsburg, 43 Pa. St. 391; Bradley *v.* Franklin County, 65 Mo. 638; Burr *v.* Carbondale, 76 Ill. 455; Burlington, etc., R. Co. *v.* Saunders County, 16 Neb. 123."

When the Complainant has, by his delay, induced or suffered the respondent to incur expenses or enter into arrangements of a burdensome character, a court of equity will consider that he is guilty of such *laches* as preclude him from obtaining relief. (See 12 Amer. and Eng. Encyc. of Law, p. 549, and numerous authorities cited

therein under Note 1). Among the authorities cited are Hollingsworth *v.* Fry, 4 U. S. (4 Dall.) 345; Mason *v.* Crosby, 1 Woodb. and M. (U. S.) 342, and cases in Alabama, Pennsylvania, Massachusetts, New Jersey, Wisconsin, and Vermont.

In the case of Sheldon *v.* Rockwell, 9 Wis. 166, the Supreme Court of Wisconsin held:

"If a land owner stands by while an adjoining proprietor is erecting a mill and constructing a drain, and for 19 years does not make any claim, he is thereby barred from objecting to the reconstruction of the dam after it has been carried away by high water; for the plaintiff, by his silence and acquiescence, has invited and encouraged the defendants to expend their time and means in the construction and repairing of the dam and the mills and machinery used in connection with it."

"If a land owner stands by and permits money to be expended in the construction of a drain under a drain act, he will not thereafter be allowed to attack the proceedings for laying out the drain on the ground of irregularity. State *v.* Little, 49 N. J. L. 182."

In that case the court said:

"Where delay has permitted the expenditure of money in the furtherance of enterprises of a quasi public nature, or where under cover of a proceeding of a public nature, individuals have been induced by the delay to expend their own money or labor, the writ (of *certiorari*) will be dismissed. There must be reasonable diligence shown in the prosecution where other interests are involved in the delay." Citing State *v.* Logan, N. J. L. 421; State *v.* Blake, 35 N. J. L. 208; Haines *v.* Campion, 18 N. J. L. 49.

Counsel for defendants concede that it is the general rule that *laches* on the part of its officers is not imputable to the government in its character of sovereign. There

is, however, an exception to this rule. If where the government descends into business transactions and where those with whom it deals in such transactions, are injured by the *laches* of its officers, the government is precluded the same as an individual. In such cases the defense of *laches* is as available as if the complainant were a private individual. See Jay Cooke *v.* United States, 91 U. S. 389. In that case, Chief Justice Waite, speaking for the court, said: "Still a government may suffer loss through the negligence of its officers. If it comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals."

A court of equity requires reasonable diligence on the part of those seeking its aid, and discourages *laches* by making it a bar to relief; therefore, the plaintiff on filing his bill for an injunction, must make it appear that he has used reasonable diligence in invoking the aid of the court, otherwise the relief will be denied. See 10 Encyc. of Amer. and Eng. Law, p. 802, and a large number of authorities therein cited under Note 1, in support of this doctrine, some of which are cases decided by the Supreme Court of the United States. Commenting upon these authorities, the author of the text cited says: "This rule would be applicable in all cases where the plaintiff knowingly prevented (permitted?) the defendant to expend considerable sums of money in making improvements or erections complained of." Smith *v.* Clay, Ambl. 645, in which it was stated: "Nothing can call forth this court into activity but conscience, good faith and reasonable diligence. When these are wanting the court is passive and does nothing."

In the case of Griffin *v.* Augusta, etc., R. R. Co., 70 Ga. p. 164, the Supreme Court of Ga., said: "One cannot stand by and suffer another to expend large amounts

of money on his land as a part of a great system of improvement, and then stop by injunction the entire system until he is paid."

In the case of Logansport *v.* Uhl, 99 Ind. 531, the Supreme Court of Indiana, held as follows: "Where the owner of a water power stands by, and, not objecting, permits a city, without first assessing and paying his damages, to erect works for a water supply by drawing water from the stream and thus diminishing his power, he creates an equitable estoppel, so that he will not be protected by injunction, but will be left to assert his rights at law."

In the case of Clark *v.* Cambridge and Arapahoe Irrigation and Improvement Co., 45 Neb. 808, the Supreme Court of Nebraska said:

"It is clearly established by the proofs that the construction of the irrigating ditch was undertaken and carried out in good faith in accordance with the purpose of its creation, at a cost of many thousands of dollars, and in the belief on the part of its promoters and managing officers that it was entitled to divert the water of the Republican river. It is also practically undisputed that the plaintiff was from the first advised of both the undertaking and the purpose of the defendant, and it is certain that he interposed no objection thereto until after the substantial completion of the work. The rule which denies relief in equity to one who has slept upon his rights applies in all its force to cases where the defendant is engaged in a work of public interest. In fact there is no principle more firmly established in the jurisprudence of this country than that a suitor who has by his *laches* made it impossible to restrain the completion or use of public works without great injury to his adversary or the public, will be left to pursue his ordinary legal remedies." (Citing Erie R. Co. *v.* Del., L. & W. R.R. Co., N. J. Eq. 283; Traphagan *v.* Mayor of Jersey City, 21 N. J. Eq. 206; Campbell *v.* In-

dianapolis & V. R. Co., 110 Ind. 490; Midland R. Co. *v.* Smith, 113 Ind. 233; Organ *v.* Memphis & L. R. Co., 11 S. W. Rep'r (Ark.) 96; Goodwin *v.* Cincinnati & Whitewater Canal Co., 18 O. St. 169; Curtis *v.* LaGrande Water Co., 20 Ore. 34; High Injs. sec. 643; Rorer, Railroads, 741–757; Wood, Railway Law, 794.) "And the same principle is recognized by this court in Mosser *v.* Seeley, 10 Neb. 460; State *v.* Graham, 21 Neb., and Forbes *v.* McCoy, 24 Neb. 702."

Applying the rule which is conclusively established by the authorities which we have cited above, the Complainant in the case at bar, by its inexcusable delay has been guilty of *laches*, and it has created an equitable estoppel, so that it cannot now be protected by injunction. This Court or any other court having jurisdiction, must leave the Complainant to assert its rights at law. If at law, the Complainant establishes before a jury, actual damages; and, if it appears that such damage will be of a continuing nature, it might then apply for an injunction, but not before.

Conclusion.

It is conceded by Defendants that the pollution of the waters of a stream, which renders such waters unfit for domestic, manufacturing, agricultural and other uses, may become an injury to the riparian proprietors, and a nuisance, which a court of equity, having jurisdiction of the parties and the subject-matter, may abate by injunction if a timely and proper application be made. But Defendants deny in their answer that the turning of the sewage of the City of Chicago or of the Sanitary District of Chicago, into the Des Plaines River, in the County of Will, in the State of Illinois, accompanied as it is with 300,000 cubic feet per minute of the pure water of Lake

Michigan, which pure water is twenty [illegible]s great in quantity as the sewage which it carries with it, will pollute the waters of the Mississippi River, below the mouth of the Illinois River, which is over 300 miles by river, from the point where said water and sewage are turned into the Des Plaines River. The Bill of Complaint does not allege that the waters of the Mississippi River, along the territory of Complainant, have been polluted; but it is alleged that said waters will be polluted, if said sewage is turned into the Des Plaines River. This latter allegation is but the expression of an opinion, and is not the allegation of a fact. The expression of the opinion by Defendants that no pollution of the waters of the Mississippi River will be produced by their acts, has, and should receive equally as great weight with this Honorable Court, as should the expression of Complainant's opinion, and much greater weight, since Defendants cite the fact, which is so well known that this Court will take cognizance thereof without proof, that all the cities and towns on the Mississippi and Missouri Rivers and their tributaries, above the City of St. Louis, have heretofore discharged their sewage into said rivers and their tributaries and that it has been carried and is now being carried into the Mississippi River, below the mouth of the Missouri River, and that this vast region, whose natural and inevitable drainage is through the Mississippi River which forms the eastern boundary of the State of Missouri, is inhabited by more than fifteen million people.

Attention of the Court is called to another fact, which is stated in the answers of the Defendants, in this connection, namely, that for more than twenty years past the sewage of the City of Chicago has been pumped into the Illinois and Michigan Canal and discharged into the Des Plaines River, and has flown into the Illinois River.

Notwithstanding this fact, which cannot and will not be denied, and the further fact that the drainage of cities and towns above the mouth of the Missouri River, having a population of more than fifteen million people, has been, from a time whereof the memory of man runneth not to the contrary, into the Mississippi River, along the eastern boundary of the State of Missouri, the Bill of Complaint alleges that the cities and towns in said State, below the mouth of the Illinois River by their waterworks systems, "furnish the inhabitants of said cities and towns with an adequate supply of pure and wholesome water, fit and healthful for drinking and all other domestic purposes and uses, from the said Mississippi River, so flowing in its ancient, accustomed and natural course." If as it appears, no pollution of the waters of the Mississippi River has heretofore been produced, notwithstanding the vast area which it has drained, what injury can possibly result from the emptying into the Des Plaines and Illinois Rivers of 300,000 cubic feet per minute of pure water from Lake Michigan?

The Sanitary District of Chicago has expended of public funds about $34,000,000 in the construction of this canal. It has devised, constructed and completed the greatest municipal enterprise for drainage and sanitary purposes, ever undertaken in any country in the world. The vast expenditure of public money which has been required for its completion, is but a bagatelle, compared with the incalculable benefit which will be enjoyed by the people of Chicago and Cook County for all time to come. Those people ought not to be deprived of that benefit by injunction, unless it shall hereafter appear, by facts which time and actual experience develop and after the most thorough investigation by a court of competent jurisdiction, that other people's rights have been imperiled, and

that upon balancing the inconveniences or injuries, greater injury will be inflicted by refusing an injunction than by granting it.

If the City of Chicago is permitted to use the great drainage canal, which it has constructed, it will be the best drained and best watered city in the world. Its population, which in the past has had a most phenomenal increase, will soon exceed that of any city in the Union, and we may confidently expect that, within the lifetime of those now living, it will become the commercial centre of the world. In view of such vast possibilities for this great city, Defendants venture to suggest to this Honorable Court, that it should not, by its injunction, prevent the complete and permanent utilization of the greatest sanitary enterprise ever constructed.

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